Supreme Court, U.S.
FILED

98 2 023 JUN 16 1999

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ALABAMA MUNICIPAL INSURANCE CORPORATION, ET AL.,

Petitioners,

v.

STATE OF ALABAMA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. BALL, JR.
FRED B. MATTHEWS
Ball, Ball, Matthews & Novak, P.A.
Post Office Box 2148
Montgomery, AL 36102
(334) 387-7680

KENNETH S. GELLER
Counsel of Record
CHARLES ROTHFELD
JAMES M. OLESKE, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

68pp

QUESTIONS PRESENTED

1. Whether the Supreme Court of Alabama erred when it rejected an equal protection challenge to two tax classifications that: (a) reward *past* conduct despite their asserted purpose of inducing *future* economic activity; (b) cannot plausibly be said to have been designed to advance their stated goals because those goals are inconsistent with state law and policy; and (c) are motivated solely by a desire to create a favored class.

2. Whether the plaintiff in a "rational basis" equal protection challenge must prove its case "beyond a reasonable doubt."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, American Colonial Insurance Co., Inc., Baldwin Mutual Insurance Co., Centennial Casualty Co., Liberty Southern Insurance Co., Inc., Safeway Insurance Co. of Alabama, and Southern Guaranty Insurance Co. are petitioners. H.E. Monroe, Jr., Commissioner of Revenue of the State of Alabama, and Michael DeBellis, Commissioner of Insurance of the State of Alabama, were parties to the proceedings in the Supreme Court of Alabama.

Petitioners submit the following corporate disclosure statement:

Alabama Municipal Insurance Corporation, Baldwin Mutual Insurance Co., and Liberty Southern Insurance Co., Inc. have no parent companies. American Colonial Insurance Co., Inc.'s parent company is The Colonial Company. Centennial Casualty Co.'s parent company is Robinson Adams Insurance Inc. Safeway Insurance Co. of Alabama's parent company is Safeway Insurance Co. Southern Guaranty Insurance Co.'s parent company is Winterthur U.S. Holdings, Inc. There are no publicly held companies (other than the listed parent companies) which own 10 percent or more of the stock of any of the petitioners.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (I)

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 1

A. Alabama's Insurance Premium Tax 2

B. Proceedings Below 5

REASONS FOR GRANTING THE PETITION 8

I. THE ALABAMA SUPREME COURT'S DECISION CONFLICTS WITH RULINGS OF THIS AND OTHER COURTS ON THE SCOPE OF "RATIONAL BASIS" REVIEW UNDER THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE 10

A. The Alabama Supreme Court's Decision Conflicts With This Court's Teaching That Classifications Rewarding Past Actions Are Not Rationally Related To A Legitimate State Interest In Inducing Future Behavior 11

TABLE OF CONTENTS — Continued

Page

B. The Alabama Supreme Court's Decision Cannot Be Reconciled With The Rule That Classifications Inconsistent With State Law Are Not Rationally Related To Legitimate State Interests 15

C. The Alabama Supreme Court's Decision Conflicts With The Rule That Classifications Undertaken For Their Own Sake Deny Equal Protection 22

II. THE ALABAMA SUPREME COURT ERRED IN REQUIRING PETITIONERS TO PROVE THEIR EQUAL PROTECTION CLAIM "BEYOND A REASONABLE DOUBT" 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Addington v. *Texas*, 441 U.S. 418 (1979) 26

Allegheny Pittsburgh Coal Co. v. *County Commission*, 488 U.S. 336 (1989) . . . . . *passim*

Bagley v. *Vermont Dep't of Taxes*, 500 A.2d 223 (Vt. 1985) 14, 15

Birchfield v. *Birchfield*, 417 N.W.2d 891 (S.D. 1988) 24

Blaske v. *Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. 1991) 24

Branson Sch. Dist. RE-82 v. *Romer*, 161 F.3d 619 (10th Cir. 1998) 25

Bruns v. *Iowa*, 503 N.W.2d 607 (Iowa 1993) 24

City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) 9, 10, 23

Cooper v. *Mitchell Brothers' Santa Ana Theater*, 454 U.S. 90 (1981) 25

FCC v. *Beach Communications, Inc.*, 508 U.S. 307 (1993) 25

Ford Motor Co. v. *Barrett*, 800 P.2d 367 (Wash. 1990) 24

Gilman v. *Martin*, 662 P.2d 120 (Alaska 1983) 15

TABLE OF AUTHORITIES — Continued

Page(s)

Harbor Ins. Co. v. *Groppo*, 544 A.2d 1221 (Conn. 1988) 24

Heller v. *Doe*, 509 U.S. 312 (1993) 20

Hooper v. *Bernalillo County Assessor*, 472 U.S. 612 (1985) 10, 12, 13

Lindsey v. *Normet*, 405 U.S 56 (1972) 10, 19

Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 10, 19, 23

Mathews v. *Lucas*, 427 U.S. 495 (1976) 2

Metropolitan Life Ins. Co. v. *Ward*, 470 U.S. 869 (1985) . . . . . *passim*

Nordlinger v. *Hahn*, 505 U.S. 1 (1992) . . . . . *passim*

Oklahoma Educ. Ass'n v. *Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929 (10th Cir. 1989) 25

Pace Membership Warehouse v. *Axelson*, 938 P.2d 504 (Colo. 1997) 24

Quinn v. *Millsap*, 491 U.S. 95 (1989) 10

Richardson v. *Sport Shinko*, 880 P.2d 169 (Haw. 1994) 24

Romer v. *Evans*, 517 U.S. 620 (1996) . . . . . *passim*

TABLE OF AUTHORITIES — Continued

Page(s)

Schweiker v. *Wilson*, 450 U.S. 221 (1981) 2

South Dakota v. *American Bankers Ins. Co.*,
374 N.W.2d 609 (S.D. 1985) 18

United States v. *Baker*,
63 F.3d 1478 (9th Cir. 1995) 25

United States v. *Carolene Prods. Co.*,
304 U.S. 144 (1938) 18

United States v. *Johns*,
984 F.2d 1162 (11th Cir. 1993) 25

United States Dep't of Agric. v. *Moreno*,
413 U.S. 528 (1973) 10

Westling v. *County of Millie Lacs*,
581 N.W.2d 815 (Minn. 1998) 24

Williams v. *Vermont*, 472 U.S. 14 (1985) . . . . . *passim*

Wisconsin v. *Akins*,
544 N.W.2d 392 (Wisc. 1996) 24

Zobel v. *Williams*, 457 U.S. 55 (1982) . . . . . *passim*

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. XIV, § 1 1

28 U.S.C. § 1257 1

ALA. CONST. art. IV, § 103 21

TABLE OF AUTHORITIES — Continued

Page(s)

ALA. CODE § 27-2-21 . . . . . 20, 21

ALA. CODE § 27-4A-3(a) 4

ALA. CODE § 27-41-34 4-5

MISCELLANEOUS

Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) 24

INSURANCE, GOVERNMENT, AND SOCIAL POLICY 64 (Spencer L. Kimball & Herbert S. Denenberg eds., 1969) 20

PETITION FOR A WRIT OF CERTIORARI

Alabama Municipal Insurance Corporation, American Colonial Insurance Co., Inc., Baldwin Mutual Insurance Co., Centennial Casualty Co., Liberty Southern Insurance Co., Inc., Safeway Insurance Co. of Alabama, and Southern Guaranty Insurance Co. petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 1a-14a) is reported at 730 So. 2d 107. The judgment of the Circuit Court of Montgomery County (App., *infra*, 15a-26a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on May 22, 1998. A timely petition for rehearing was denied on February 19, 1999. App., *infra*, 27a. On May 11, 1999, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including June 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case, which involves a challenge to a wholly irrational scheme of state tax credits, presents fundamental questions about the scope of rational basis scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We recognize, of course, that equal protection review of state tax legislation is highly deferential, and it is a truism that state economic classifications will be upheld so long as their

connection to the State's purposes "is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992). But the approach taken below effectively disavows *any* scrutiny of such legislation challenged under the Equal Protection Clause; the Alabama Supreme Court contented itself with a recital of the State's asserted purposes and made no attempt to inquire how those purposes possibly could be advanced by the State's scheme. Such an approach cannot be reconciled with this Court's repeated admonition that the "rational-basis standard 'is not a toothless one'" (*Schweiker* v. *Wilson*, 450 U.S. 221, 234 (1981) (quoting *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976))), conflicts with the holdings of other state supreme courts in closely analogous circumstances, and validates a distinction that manifestly does not further the State's articulated goals. Further review therefore is warranted.

A. Alabama's Insurance Premium Tax

The Alabama tax law at issue in this case is the direct successor to the discriminatory statute invalidated by this Court's decision in *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985). The Court held the original statute unconstitutional because it imposed a higher insurance premium tax upon foreign insurance companies than upon domestic ones. In an attempt to remedy the deficiency identified by *Ward*, Alabama entered into negotiations with the *Ward* plaintiffs that eventually resulted in a proposal to set the base insurance premium tax for non-life and non-health insurance at 3.6% for both foreign and domestic insurers. This formula was modified, however, to accommodate Alfa Mutual Insurance Company ("Alfa"), Alabama's largest domestic property and casualty insurer.

In an attempt to gain Alfa's support, an attorney for the *Ward* plaintiffs transmitted to Alfa's attorney a proposal that included a draft of two tax credit formulas. Plaintiffs' Trial Exhibit ("Pl. Tr. Exh.") 33. The first formula (for the

"Office Facilities Credit") was designed to provide incremental credits based on both the number of insurance offices owned or leased by the insurer and the number of employees working in those offices, for a total credit not to exceed 1% of the insurer's taxable premiums.[1] The second formula (for the "Real Property Investment Credit") provided credits based on every $1 million in Alabama real estate owned by an insurer, also for an aggregate credit not to exceed 1% of taxable premiums. It is undisputed that, at the time the attorney for the *Ward* plaintiffs was developing these proposed credits, he was receiving detailed information from Alfa as to the number of offices and employees Alfa had in Alabama (Pl. Tr. Exh. 30) and the extent of its domestic real estate holdings. Pl. Tr. Exh. 28; R. 164-66, 193-94.

By early 1993, the 3.6% base premium tax and the two credits drafted for Alfa had made their way into a bill being considered by the Alabama legislature. Pl. Tr. Exh. 35. Before the bill ultimately was passed, however, Alfa requested one further change. Alfa asked that the multiplier used in the Real Property Investment Credit be adjusted so as to require a $10 million rather than a $3 million investment to receive the full 1% credit. Pl Tr. Exh. 40 (suggesting that insurers receive a 0.1% credit for each $1 million investment

---

[1] The provision offers a specified credit against the premium tax for each office operated in the State, with the precise amount of the reduction determined by the number of employees in the office. An office with between one and three employees entitles the company to an 0.0025% credit; one with between four and ten employees provides a 0.0050% credit; one with between 11 and 50 employees offers a 0.0075% credit; and one with 51 or more employees provides a 0.01% credit. As noted in the text, the aggregate credit may not exceed 1% of the insurer's taxable premiums. See App., *infra*, 3a-4a n.1. The Office Facilities Credit contains no requirement that offices be placed in any particular type of location or meet any specific definition.

rather than a 0.35% credit). This change, which restricted the number of insurance companies that can take the full Real Property Investment Credit but had *no* effect on Alfa's ability to take the full credit, was adopted by the Alabama legislature.[2] As revised, the insurance premium tax credits were passed into law on May 17, 1993, and are codified at ALA. CODE § 27-4A-3(a)(3). App, *infra*, 28a.

Unsurprisingly, Alfa was the only company in Alabama that qualified to take both the full 1% Office Facilities Credit and the full 1% Real Property Investment Credit; the two credits allowed Alfa to reduce its 1995 tax liability from $10,728,560 to $5,960,311. App., *infra*, 17a. Two additional companies received partial credits.[3] But as the trial court found, none of the more than 600 other insurance companies doing property and casualty business in Alabama "realized a substantial benefit from the credits." *Id.* at 18a. See R. 31-32, Pl. Tr. Exh. 70.[4] In part, this is so because many companies are *precluded by Alabama law* from taking advantage of the Real Property Investment Credit. Section

---

[2] As enacted, the Real Property Investment Credit entitles an insurer to a credit of 0.1% of its taxable premiums for each "$1,000,000 in value of real property investments in the State of Alabama." ALA. CODE § 27-4A-3(a)(3)d.2. The total credit may not exceed 1% of the insurer's taxable premiums, meaning that an investment of $10 million is needed to obtain the full available credit.

[3] Allstate Insurance Company and the State Farm Group respectively qualified for combined Office Facilities and Real Property Investment Credits of 1.17% and 1.215%. App., *infra*, 17a.

[4] Of the original eight plaintiffs, "two realized no credit. The credit realized by five plaintiffs ranges from .0025% to .02%. Southern Guaranty Insurance Company realized .3125% credit." App., *infra*, 18a.

27-41-34(b)(2) of the Alabama Code provides that an insurance company's real estate investments "shall not exceed 10 percent of the insurer's admitted assets." As a consequence, companies with less than $10 million in assets, including three of the petitioners in this case, are completely foreclosed from investing the $1 million necessary to receive even a marginal credit, while "[a] company with less than one hundred million dollars in assets is effectively prohibited from investing as much as ten million dollars in real estate," and thus from obtaining the full 1% investment credit. App., *infra*, 18a. As the trial court found, the tax classification accordingly "favors larger companies and concurrently burdens smaller ones." *Ibid.*

B. Proceedings Below

Pointing to the discriminatory effects of the credits, eight Alabama insurance companies brought this action in state court,[5] contending that the state scheme violates the equal protection guarantees of the United States and Alabama Constitutions. The trial court agreed, holding the tax credits unconstitutional under the state constitution. App., *infra*, 15a-26a. The court began by declaring that it was "mindful of the broad area of discretion available to the Legislature in tax matters," recognizing that it could not "substitute its preference merely because it disagrees with the legislative scheme." *Id.* at 19a. The court went on to note that, although "[t]he Alabama Legislature provided no express purpose for the subject legislation," "[t]he State's conceivable purposes fall into two broad categories. The first involves economic development including the promotion of insurance offices, employment and the insurance industry generally. The second involves the promotion of the availability of

---

[5] One of the original plaintiffs, American Mining Insurance Co., is no longer a party to this action.

insurance, the encouragement of its use and the promotion of a vigorous insurance market." *Ibid.*

The trial court held, however, that these purposes are not advanced by the credits. While the court noted the State's claim "that the legislation will result in considerable economic benefits such as construction and employment," it found that the credits could not encourage *new* investment because they can be satisfied "by pre-legislative activity" — and Alfa in fact "achieved both credits through real estate investment and an office staffing situation[] *that existed at the time of the passage of the Act.*" App., *infra*, 20a (emphasis added). See *ibid.* ("The Act contains no requirement that there be economic activity as a condition to achieving either credit."). The court therefore concluded that

> [t]he relationship between [Alabama's] economic goals and the classification is attenuated. * * * The evidence is conclusive that the legislation ultimately provides a subsidy for Alfa and to a lesser extent Allstate and State Farm and as such, does not encourage vigorous competition, but tends to encourage monopoly * * * . The classification also appears to be inconsistent with settled state law or policies concerning the sound solvency regulation of insurance companies, free competition and fundamental economic rights. As such, some asserted purposes could be considered pretextual.

Id. at 20a-21a. Having thus held the credits unconstitutional under the state constitution, the trial court found it unnecessary to determine whether they also are inconsistent with the United States Constitution. *Id.* at 22a.[6]

---

[6] In holding the tax invalid under the state constitution, however, the court cited several of this Court's equal protection decisions, including *Nordlinger* and *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336 (1989). See App., *infra*, 20a-

On appeal, the Alabama Supreme Court reversed the trial court's state constitutional ruling and went on to hold that "it is not clear beyond a reasonable doubt that the tax credits at issue violate * * * the Federal Constitution." App., *infra*, 8a. First addressing the state constitutional arguments, the court reasoned that

> [w]e are not unaware of the argument that some insurers are prevented from investing the maximum amount in Alabama real estate because their total assets are too low. However, we note that the conditions prevailing today are not necessarily constant. Those companies could grow and thus be able to invest more. We find persuasive the State's argument that the statute does not discriminate, in that it does not create classes of insurers to be treated differently from other classes.

App., *infra*, 9a.

Turning next to the federal issue, the Alabama Supreme Court explained that the constitutional challenge would be resolved by application of the rational basis test. App., *infra*, 10a. With this in mind, the court noted the State's contention that it had three related purposes in enacting the credits: the Office Credit ostensibly was intended "to encourage competition among insurers in rural areas of the state" and "to encourage the employment of Alabama citizens," while the Real Property Investment Credit was designed "to encourage all insurance companies, foreign and domestic, to invest in Alabama property." *Id.* at 11a. Against this background, the court held, without further analysis, that

> [t]he tax credits employed reasonable classifications designed to reach the legitimate legislatively determined goals of encouraging investment in the state and

---

[6] (...continued)
21a.

> encouraging employers to employ Alabama citizens and to open offices in rural areas. Whether the challenged tax credits are rationally related to these goals is "at least debatable." It was reasonable for the members of the legislature to believe that these goals would be promoted by the adoption of the credits. Consequently, we conclude that the challenged credits do not violate the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

Id. at 11a-12a.

REASONS FOR GRANTING THE PETITION

As a general matter, rational basis review under the Equal Protection Clause is highly deferential and "requires only that the classification rationally further a legitimate state interest." *Nordlinger*, 505 U.S. at 10. Even so, however, and "even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause[.]" *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). The decision below disregarded that requirement: although the Alabama Supreme Court recited the asserted rationales for the state classification, the court found it unnecessary to make any meaningful inquiry into whether the state scheme did (or possibly could) advance the State's ostensible purposes. This approach renders the Equal Protection Clause wholly meaningless.

While recognizing that legislatures must have substantial leeway in drawing social and economic classifications, this Court's decisions have identified at least three circumstances in which such classifications fail the rational basis test. *First*, when the legislature seeks to provide incentives for *future* behavior, classifications that accord differential treatment on the basis of *past* actions will not be considered rational. See,

e.g., *Zobel* v. *Williams*, 457 U.S. 55, 62 (1982). *Second*, when the asserted state interest supporting a distinction is inconsistent with established state policy, the legitimacy of the State's claim that it is attempting to advance that interest will be cast into doubt. See, *e.g.*, *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 344-45 (1989); *Nordlinger*, 505 at 10. And *third*, when it is clear that the actual purpose of a challenged distinction is nothing more than the creation of a favored class, core principles of equal protection demand that the classification be struck down. See, *e.g.*, *Romer*, 517 U.S. at 634-635; *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446-448 (1985). Here, the court below ignored each of these principles — in the process departing from this Court's holdings and creating a conflict with the decisions of other state courts of last resort.

Moreover, by requiring that petitioners prove their equal protection claim *beyond a reasonable doubt*, the Alabama Supreme Court erected a barrier foreign to this Court's constitutional jurisprudence. Not only is this strict evidentiary burden irrelevant to the purely legal question of a statute's facial validity (as at least one federal court of appeals has recognized), its application to rational basis challenges threatens to make impossible the already difficult task of proving such claims. This danger has been realized in the instant case, where the court below upheld a discriminatory tax scheme that sidesteps this Court's decision in *Ward* and continues to provide special treatment to Alabama's largest domestic property and casualty insurer by making irrational classifications.

Review of the decision below would allow the Court to bring necessary clarity and coherence to the law governing rational basis scrutiny. The Court has not infrequently struck

down state classifications for failure of the rational basis test,[7] but its decisions doing so have something of a "know it when you see it" quality. Guidance from this Court could help rein in extravagant invocations of the Equal Protection Clause — and, at the same time, could guard against state discrimination, like that in this case, that "has so speculative and attenuated a connection to its goal as to amount to arbitrary action." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (opinion of Blackmun, J.).

I. THE ALABAMA SUPREME COURT'S DECISION CONFLICTS WITH RULINGS OF THIS AND OTHER COURTS ON THE SCOPE OF "RATIONAL BASIS" REVIEW UNDER THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

"When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (footnote omitted). The broad outlines of this sort of scrutiny are familiar.

> In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, * * * the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, * * * and the relationship of the

---

[7] *See, e.g.*, *Romer*; *Quinn* v. *Millsap*, 491 U.S. 95 (1989); *Allegheny Pittsburgh*; *City of Cleburne*; *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams* v. *Vermont*, 472 U.S. 14 (1985); *Zobel*; *Logan*, 455 U.S. at 438-442 (opinion of Blackmun, J.); *id.* at 443 (Powell, J., concurring in the judgment); *Lindsey* v. *Normet*, 405 U.S 56, 74-77 (1972); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528 (1973).

> classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger, 505 U.S. at 11. The Alabama Supreme Court evidently regarded this test as so much boilerplate. But *meaningful* rational basis scrutiny is essential to preclude "arbitrary distinction[s]" (*Williams* v. *Vermont*, 472 U.S. 14, 22 (1985)), to "ensure that classifications were not drawn for the purpose of disadvantaging the group burdened by the law" (*Romer*, 517 U.S. at 633), and to "provide[] guidance and discipline for the legislature, which is entitled to know what sort of laws it can pass." *Id.* at 632. This Court's application of these principles in specific contexts relevant to this case removes any doubt that the tax credits challenged by petitioners violate the fundamental constitutional guarantee of equal protection.

A. The Alabama Supreme Court's Decision Conflicts With This Court's Teaching That Classifications Rewarding Past Actions Are Not Rationally Related To A Legitimate State Interest In Inducing Future Behavior.

1. The Alabama Supreme Court concluded that the tax credits at issue in this case are reasonably related to several legitimate state interests: encouraging the employment of Alabama residents, encouraging the opening of insurance offices in rural areas, and encouraging investment in the State. App., *infra*, 11a. All of these interests concern the inducement of *future* action by insurance companies. As the trial court observed, however — without contradiction from the state supreme court — the "Act contains no requirement that there be economic activity as a condition to achieving either credit." *Id.* at 20a. Rather, the credits are available to insurance companies that have the requisite number of employees, offices, or real estate holdings, even if those criteria are met "by pre-legislative activity." *Ibid.* For example, Alfa, the largest domestic property and casualty

insurance company in Alabama and the principal beneficiary of the tax credits, qualified for the maximum credits based *entirely* on its past behavior; it accordingly has no incentive under the Act to make any future investments. Under these circumstances, the connection between the challenged classifications and the State's purported interest in spurring future investment is far too attenuated to pass constitutional scrutiny.

In a very similar case, this Court recognized that an asserted interest in inducing *future* action cannot be rationally furthered by a classification that selectively provides benefits for *past* conduct. In *Zobel*, the Court examined an Alaska dividend program enacted in 1980 that provided benefits to citizens from a state fund based on years of residency subsequent to 1959. Much like Alabama here, Alaska contended in *Zobel* that its benefit program created a "financial incentive for individuals to establish and maintain residence in Alaska." 457 U.S. at 61. The Court rejected this argument in no uncertain terms: "the State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment." *Id.* at 62 (footnote omitted). The Court subsequently reaffirmed that principle in *Hooper*, holding that "the legislature cannot plausibly encourage [the desired conduct] by passing such retroactive legislation." 472 U.S. at 619 (footnote omitted). Likewise, Alabama's interest in inducing future investment is not in any way furthered by giving tax credits for real estate already purchased, offices already opened, and employees already hired.

In addition to holding that Alaska's dividend program did not further the State's asserted interest in encouraging immigration, the *Zobel* Court observed that providing benefits for past residency actually would undermine the State's asserted interest because newcomers would be at a relative disadvantage and "more likely to become dissatisfied and to leave the State." 457 U.S. at 62 n.9. The Court explained:

> [I]t would thus seem that the State would give a larger, rather than smaller, dividend to new residents if it wanted to discourage emigration. The separation of residents into classes hardly seems a likely way to persuade new Alaskans that the State welcomes them and wants them to stay.

Ibid. This reasoning applies with equal force here. Alabama's tax credits — which give a substantial tax (and competitive) advantage to large and established insurance companies that already have made the requisite investments — likely will discourage smaller companies from entering a market where they will be at an immediate (and, as we explain below, permanent) disadvantage. It thus seems undeniable that the separation of insurance companies into a favored class of fully invested companies and a disfavored class of small companies that have the potential for future growth is "not rationally related to the State's asserted legislative goal." *Hooper*, 472 U.S. at 622.

This fatal flaw — providing a reward for past behavior when the State's asserted interest is inducing future conduct — is not cured by the fact that the Alabama tax credits apply both to past and to future action. The same was true of the statute struck down in *Zobel*, which granted "increased dividend benefits for each year of continued Alaska residence." 457 U.S. at 62. Although the Court assumed that this aspect of the Alaska law "might give some residents an incentive to stay in the State in order to reap increased dividend benefits in the future" (*ibid.*), it concluded that it "need not consider whether the State could enact the dividend program prospectively only." *Id.* at 64. Instead, the Court invalidated that portion of the statute that provided benefits for pre-enactment conduct and remanded the case so that the Alaska Supreme Court could consider the severability of the statute. *Id.* at 64-65. The same should be done here.

2. The Alabama Supreme Court's rejection of the proposition that it is irrational to use rewards for past conduct as a means to induce future behavior — despite the trial court's recognition of the problem (see App., *infra*, 20a) and petitioners' focus on the issue (see Brief of Appellees in the Supreme Court of Alabama at 43-45) — stands in clear contrast to decisions of other state supreme courts that have applied *Zobel* to strike down discriminatory tax credits and fee reductions. For example, in *Bagley* v. *Vermont Dep't of Taxes*, 500 A.2d 223 (Vt. 1985), the Supreme Court of Vermont considered a tax credit that was made available to individuals who installed certain types of energy systems in their homes. To earn the credit for a particular year, Vermont taxpayers had to show not only that they had installed a qualifying system, but also that they were Vermont residents for the entire calender year. As a result, an individual who moved to Vermont from another State on July 1 of a given year and immediately installed a qualifying system would not be eligible for the tax credit, whereas an individual who resided in Vermont from January 1 through July 1 and then installed the same system would be eligible.

Relying on this Court's decision in *Zobel*, the Vermont Supreme Court held that using past behavior as a criterion for awarding benefits "bears no rational or legitimate relationship to a legislative purpose." The court explained:

> The durational residency requirement addresses a time prior to installation of the system. Obviously, requiring permanent residency *before* installation does not encourage installation of alternative energy systems and, if anything, discourages it. * * * The[r]e are valid reasons to require post-installation continuing residency, * * * but pre-installation permanent residency "is a wholly arbitrary basis on which to distinguish among present Vermont [residents]."

Id. at 226 (quoting *Williams*, 472 U.S. at 23) (citation omitted). Similarly, to the extent that the Alabama tax credits provide disparate benefits based on past conduct, they do not encourage future investment and are a wholly arbitrary basis on which to distinguish among insurance companies doing business in Alabama.

The Vermont Supreme Court is not alone in recognizing the applicability of the *Zobel* principle to cases in which state interests in inducing future conduct are asserted to support classifications that are based, at least in part, on past behavior. In *Gilman* v. *Martin*, 662 P.2d 120 (Alaska 1983), the Alaska Supreme Court reviewed a municipal ordinance that provided for a five percent reduction in the sale price of public land for each year that the private buyer had been a resident of the municipality. The State argued that the discount program could be upheld despite *Zobel* because it "rationally further[ed] a legitimate government purpose; namely, inducing residents to remain in their communities." *Id.* at 128. The Alaska Supreme Court flatly rejected this contention, explaining that, "[t]o the extent that discounts are granted for years of residence completed prior to the enactment of the ordinance, *it is not even a close question* that [the ordinance] is unconstitutional. *Id.* at 129 (emphasis added). In a similar manner, insofar as the Alabama tax credits are granted for investments made prior to the enactment of the insurance premium tax statute, it is beyond debate that they are unconstitutional.

B. The Alabama Supreme Court's Decision Cannot Be Reconciled With The Rule That Classifications Inconsistent With State Law Are Not Rationally Related To Legitimate State Interests.

The decision below upholding the Real Property Investment Credit departs from this Court's precedents for a related reason as well. Although assertedly designed to encourage investment by insurance companies in Alabama

real estate, Alabama law actually *precludes* most of the State's insurance companies from taking full (and in many cases, *any*) advantage of the credit. As we have noted, state law prohibits insurance companies from investing more than 10% of their assets in real estate, meaning that a company must own $10 million in assets to use the credit at all, and must have $100 million in assets to even theoretically be in a position to make full use of the credit. For this reason, the trial court, citing *Allegheny Pittsburgh* and *Nordlinger*, held that the credit is invalid because it is "inconsistent with settled state laws or policies." App., *infra*, 20a. But the Alabama Supreme Court rejected this consideration as irrelevant, opining blithely that "[t]he tax credits employed reasonable classifications designed to reach the legitimate legislatively determined goals of encouraging investment in the state." *Id.* at 11a. That approach, which assesses the challenged classification in a vacuum and ignores other elements of state law that belie the State's asserted justification for its scheme, cannot be reconciled with this Court's holdings.

Allegheny Pittsburgh involved a practice by a West Virginia county tax assessor of assessing recently acquired property at the purchase price while making "only minor modifications in the assessments of land which had not been recently sold. This practice resulted in gross disparities in the assessed value of generally comparable property." 488 U.S. at 338. Although the Court recognized that "a State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable," it concluded that "West Virginia ha[d] not drawn such a distinction. Its Constitution and laws provide that all property of the kind held by the petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value." *Id.* at 345. Because the county tax assessor's practice was inconsistent

with this state-law principle of equal taxation,[8] the Court concluded that it was not rationally related to a legitimate state interest. *Ibid.*

The holding of *Allegheny* — that classifications whose asserted rationales are inconsistent with established state policy will be held irrational — was reaffirmed in *Nordlinger*, a case in which the Court upheld a tax assessment system in California that had virtually the same effect as the practice struck down in *Allegheny*. In considering the California system, the *Nordlinger* Court had "no difficulty in ascertaining at least two rational or reasonable considerations" that justified the system: local neighborhood preservation and protection of existing owners' reliance interests. 505 U.S. at 12. By contrast, the Court explained that there was no "indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the * * * tax assessor's unequal assessment scheme" because "the West Virginia 'Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value.'" *Id.* at 15 (quoting *Allegheny Pittsburgh*, 488 U.S. at 345). See *id.* at 26 (Thomas, J., concurring in part and concurring in the judgment) ("According to the Court, * * * the Webster County scheme * * * was irrational because it was contrary to state law."); see also *Williams*, 472 U.S. at 26 ("the exemption cannot be justified as an indirect means of encouraging out-of-staters to * * * pay Vermont sales tax, for the straightforward reason that Vermont does not impose its sales tax on nonresidents").

---

[8] See also *Allegheny Pittsburgh*, 488 U.S. at 345 ("Indeed, her practice seems contrary to that of the guide published by the West Virginia Tax Commission as an aid to local assessors in the assessment of real property.").

The common-sense rule that a State's asserted goals must be rejected as implausible when they are irreconcilable with state law has been given force by other state supreme courts in the federal equal protection context. In *South Dakota* v. *American Bankers Ins. Co.*, 374 N.W.2d 609, 615 (S.D. 1985), the Supreme Court of South Dakota reviewed an insurance premium tax that charged higher rates to foreign companies that lacked licenses to do business in the State than it did to foreign companies that held such licenses. In defending the distinction, the State argued that it "promote[d] a more competitive insurance industry in South Dakota by encouraging foreign insurers to do insurance business" there. *Id.* at 617. The Supreme Court of South Dakota rejected this argument, however, pointing to a "manifest conflict between this stated purpose and [another South Dakota statute], which exempt[ed the plaintiff,] as a foreign insurer, from obtaining a certificate of authority in South Dakota." *Ibid.* Since the "discriminatory premium tax penalize[d] the very conduct seemingly promoted under [the other statute]," the court concluded that the "stated purposes for the imposition of a higher tax on unlicensed foreign insurers [we]re pretextual." *Ibid.*

Like *Allegheny Pittsburgh* and *American Bankers*, this is a case where the conflict between the challenged classifications and established state law "preclude[s] any plausible inference that the reason for the unequal" treatment is rationally related to a legitimate state interest. *Nordlinger*, 505 U.S. at 16. See generally *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (legislation invalid if "in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators") (footnote omitted). According to the State, the Real Property Investment Credit is "designed to encourage all insurance companies * * * to invest in Alabama property." App., *infra*, 11a. But the State surely

understands, and the court below acknowledged (see *id.* at 9a), that many insurance companies are forbidden by Alabama law from making the type of investment that would enable them to qualify for the Real Property Investment Credit. In these circumstances, it is "impossible to credit" the State's justification for its classification. *Romer*, 517 U.S. at 635. That is fatal to the state scheme: "this Court's review does require that [the asserted] purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger*, 505 U.S. at 15 (citation omitted).[9]

Moreover, Alabama's effort to *discourage* real estate investments by insurers is not limited to its maximum investment rule. Richard Ford, Chief Examiner for the Alabama Insurance Department, testified that with respect to solvency — an issue of particular concern given the numerous insurance company insolvencies that resulted from the collapse of real estate values in the 1980s — the State regards real estate as falling in the same category as junk bonds. R.

---

[9] The Alabama Supreme Court's suggestion (in the context of its discussion of the state constitutional challenge) that companies now precluded from taking advantage of the real estate credit someday "could grow and thus be able to invest more" (App., *infra*, 9a) hardly saves the day for the State. Requiring small insurance companies to grow large before they can compete on a level playing field is inconsistent with Alabama's policy of promoting small businesses. See R. 313-18; Pl. Tr. Exh. 61 at 12-14. Moreover, an otherwise irrational classification that withholds a benefit from persons with low incomes surely would not be deemed constitutional because some of those persons one day might win the lottery. Cf. *Lindsey* v. *Normet*, 405 U.S. 56, 72-79 (1972). The undeniable fact is that most petitioners now (and for the foreseeable future) are unable to make full use of the credit, and as they "possessed no power [to make the requisite investments], it is unfair and irrational to punish them." *Logan*, 455 U.S. at 444 (Powell, J., concurring in the judgment).

381. Indeed, it is notable that, so far as we are aware, there is no other premium tax law in the United States that provides a credit similar to either of the credits available in Alabama. See R. 62. This "absence of precedent for [the credits] is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer*, 517 U.S. at 633 (citation omitted). Since securing solvency for the benefit of policyholders is the *sine qua non* of insurance regulation,[10] it seems inconceivable that a legitimate state interest could be served by blindly encouraging indiscriminate real estate investment by insurance companies. See generally *Heller* v. *Doe*, 509 U.S. 312, 321 (1993) ("the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation").[11]

---

[10] See ALA. CODE § 27-2-21 (establishing procedures to determine whether "every insurer licensed in this state" has the "ability to fulfill its obligations"). See generally INSURANCE, GOVERNMENT AND SOCIAL POLICY 64 (Spencer L. Kimball & Herbert S. Denenberg eds., 1969) ("The central objective of insurance regulation is to ensure the 'solidity' of every insurance company.").

[11] Not only is there a manifest conflict between the Real Property Investment Credit and Alabama law, there is a similar inconsistency between the Office Facilities Credit and Alabama policy. Dr. Claude Lilly, author of the National Association of Insurance Commissioners' RISK-BASED CAPITAL MANUAL, testified without contradiction that the artificial office configuration encouraged by the Office Facilities Credit is inconsistent with sound solvency regulation. R. 310; Pl. Tr. Exh. 113. Dr. Lilly's testimony is particularly noteworthy because Alabama has an avowed policy of meeting the "standards set by the National Association of Insurance Commissioners." ALABAMA ACTS 1993,

(continued...)

In addition to recognizing a tension between the State's asserted interest and its "law or policies concerning the sound solvency regulation of insurance companies," the trial court noted that the challenged credits also "tend[] to encourage monopoly inconsistent with Article IV, § 103" of the Alabama Constitution. App., *infra*, 20a-21a. The court explained that "[t]he evidence is conclusive that the legislation ultimately provides a subsidy for Alfa and to a lesser extent Allstate and State Farm and as such, does not encourage vigorous competition." *Id.* at 20a. The trial court also noted that the challenged tax scheme "favors larger companies and concurrently burdens smaller ones." App., *infra*, 18a.[12] This disadvantaging of small companies in the competitive marketplace directly conflicts with Alabama's longstanding policy of promoting small businesses. R. 313-18 (testimony of Insurance Commissioner Michael DeBellis); Pl. Tr. Exh. 61 at 12-14 (Alabama's brief to this Court in *Ward*).[13]

As noted above, the Supreme Court of Alabama did not reject, or even attempt to explain away, the trial court's seemingly self-evident conclusion that the challenged tax

---

[11] (...continued)
No. 93-675, § 1, reprinted at ALA. CODE § 27-2-21, Code Commissioner's Notes.

[12] The State's own expert, Dr. Harold Skipper, agreed with this assessment at trial. R. 571-72.

[13] On a related note, Alabama's claim that the credits are intended to promote insurance in rural areas cannot be reconciled with its claim in *Ward* that the best way to promote rural insurance is to provide economic incentives to small insurance companies. Pl. Tr. Exh. 1, ¶ 10 (Alabama's list of legitimate state purposes for the statute challenged in *Ward*). The fact that the tax credits disadvantage small insurance companies, and contain no requirement that large companies open rural offices, belies any claim that the credits are intended to promote rural insurance.

credits are inconsistent with state law and policy. Because this Court's decisions make clear that such inconsistencies "preclude[] any plausible inference that the reason for the unequal" treatment is rationally related to a legitimate state interest (*Nordlinger*, 505 U.S. at 16), the decision of the Alabama Supreme Court cannot stand.

C. The Alabama Supreme Court's Decision Conflicts With The Rule That Classifications Undertaken For Their Own Sake Deny Equal Protection.

In cases such as this, where the asserted state interests are "so far removed" from the classifications at issue that it is "impossible to credit them" (*Romer*, 517 U.S. at 635), there is a strong likelihood that the classifications have been "undertaken for [their] own sake, something the Equal Protection Clause does not permit." *Ibid.* That danger has been realized here, where it cannot seriously be doubted that the true purpose of Alabama's tax credits was to create a favored class of politically influential insurance companies who would benefit from the tax credits at the expense of hundreds of smaller and less powerful competitors.

The history of the Insurance Premium Tax makes clear that Alfa was the driving force behind the adoption of the tax credits. The whole concept of Office Facility and Real Property Investment Credits was developed for Alfa's benefit (R. 144, 150-51, 158-60, 163-66, 194; Pl. Tr. Exh. 28, 30, 33), and the criteria for the credits were carefully crafted to ensure that Alfa (and Alfa alone) received the maximum allowable benefit. Indeed, although the bill reported out of committee in the Alabama legislature would have allowed a broader range of companies to share in the benefits from the Real Property Investment Credit, Alfa suggested that the credit be dramatically limited (see page 3, *supra*), and the Alabama legislature dutifully made the change. As a result, not only has Alfa enjoyed a full credit from the very start, but it has also enjoyed a considerably greater advantage over its

competition than it would have if the tax credit had been made more widely available.

In saying this, we do not mean to suggest that legislative attempts to benefit particular industry groups, or even particular constituents, necessarily run afoul of equal protection principles. But the gerrymandering of the credits plainly belies the neutral and high-minded rationales asserted by the State as the bases for its tax scheme here. And the State's attempt to accomplish its purpose by advantaging some and disadvantaging other taxpayers — all of whom are, for all relevant purposes, identically situated — is insupportable. After all, "it is not enough, under the Equal Protection Clause, to say that the legislature sought to [benefit particular persons] and succeeded in doing so, for that is 'a mere tautological recognition of the fact that [the legislature] did what it intended to do." *Logan*, 455 U.S. at 441 (opinion of Blackmun, J.) (citation omitted). Instead, "[t]he Court still has an obligation to view the classificatory system, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary." *Ibid*. Here, that examination reveals that the State is pursuing a course of action driven by its desire to affect only "some fraction of the body politic." *City of Cleburne*, 473 U.S. at 448. And as Justice Stevens has explained:

> A legitimate state interest must encompass the interests of members of the disadvantaged class and the community at large, as well as the direct interests of the members of the favored class. It must have a purpose or goal independent of the direct effect of the legislation and one "that we may reasonably presume to have motivated an impartial legislature." * * * If the goal of discriminatory classification is not independent from the policy itself, "each choice [of classification] will import its own goal, and each goal will count as acceptable, and the requirement of a 'rational' choice-goal relation will be satisfied by the very making of the choice."

Nordlinger, 505 U.S. at 34 (Stevens, J., dissenting) (quoting Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1247 (1970)). See also *Ward*, 470 U.S. at 882 n.10 (rejecting the view that "any discrimination subject to the rational relation level of scrutiny c[an] be justified simply on the ground that it favor[s] one group at the expense of another"); *Romer*, 517 U.S. at 634; *City of Cleburne*, 473 U.S. at 446-47.

II. THE ALABAMA SUPREME COURT ERRED IN REQUIRING PETITIONERS TO PROVE THEIR EQUAL PROTECTION CLAIM "BEYOND A REASONABLE DOUBT."

The Alabama Supreme Court's error is perhaps explained as the product of a fundamental misunderstanding of the nature of the plaintiff's burden in an equal protection case. The court premised its decision on the threshold determination that the State's tax scheme had to be upheld because "it is not clear *beyond a reasonable doubt* that the tax credits at issue violate * * * the Federal Constitution." App., *infra*, 8a-9a (emphasis added). A number of other state courts of last resort also have held that federal rational basis claims must be proved beyond a reasonable doubt. *See Westling* v. *County of Millie Lacs*, 581 N.W.2d 815, 818-20, 822 (Minn. 1998), *cert. denied*, 119 S. Ct. 872 (1999); *Pace Membership Warehouse* v. *Axelson*, 938 P.2d 504, 506 (Colo. 1997); *Wisconsin* v. *Akins*, 544 N.W.2d 392, 395-96 (Wisc. 1996); *Richardson* v. *Sport Shinko*, 880 P.2d 169, 191 (Haw. 1994); *Bruns* v. *Iowa*, 503 N.W.2d 607, 610 (Iowa 1993); *Blaske* v. *Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. 1991); *Ford Motor Co.* v. *Barrett*, 800 P.2d 367, 374 (Wash. 1990); *Harbor Ins. Co.* v. *Groppo*, 544 A.2d 1221, 1224 (Conn. 1988); *Birchfield* v. *Birchfield*, 417 N.W.2d 891, 894 (S.D. 1988). In contrast, this Court has never applied the "beyond a reasonable doubt" burden of proof in its many equal protection cases using the rational basis test, and so far as we have been able to determine no federal court

of appeals has done so either. The state court's application of such a standard here demonstrated confusion about the nature of the relevant inquiry and imposed an essentially insuperable burden on victims of discriminatory enactments.

In fact, the questions to be answered by the court in a case like this one — whether the State's justifications are legitimate, and whether a legislator rationally could have thought those justifications to be advanced by the state classification — are *legal* ones to which the standard of proof simply has no application at all. See *Oklahoma Educ. Ass'n* v. *Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929, 932-33 (10th Cir. 1989) (whether a statute's classifications "are rationally related to legitimate state interests" for equal protection purposes "is a question of law").[14] As a consequence, it appears that the only federal court of appeals to confront the argument that the "beyond a reasonable doubt" standard should apply to federal constitutional challenges rejected it out of hand. *Branson Sch. Dist. RE-82* v. *Romer*, 161 F.3d 619, 636 n.15 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1461 (1999) ("This circuit has never applied such a standard of proof to a purely legal question of whether a statute is facially unconstitutional."). See generally *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("a legislative choice is not subject to courtroom fact finding"); *Cooper* v. *Mitchell Brothers' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (the "purpose of a standard of proof is to instruct the *factfinder* concerning the degree of confidence our society thinks he should have in the correctness of his *factual* conclusions") (citation omitted) (emphasis added).

---

[14] See also *United States* v. *Baker*, 63 F.3d 1478, 1490 (9th Cir. 1995) ("Equal protection claims are questions of law which we review de novo."); *United States* v. *Johns*, 984 F.2d 1162, 1163 (11th Cir. 1993) (whether a Sentencing Guidelines provision violates "equal protection rights is a question of law").

In any event, to the extent that the inquiry here is thought to have a factual component, the "beyond a reasonable doubt standard" plainly is the wrong one to apply. The Court has explained that this standard "historically has been reserved for criminal cases." *Addington* v. *Texas*, 441 U.S. 418, 428 (1979). *See Cooper*, 454 U.S. at 93 ("the Court has never required the 'beyond a reasonable doubt' standard to be applied in a civil case"). Even in civil cases where "particularly important interests" are at stake, the Court has applied the "clear and convincing" rather than the "beyond a reasonable doubt" standard. See *ibid.* (observing that the "clear and convincing" standard has been used in cases involving civil commitment, deportation, denaturalization, and free speech); *id.* at 93-94 (holding that First and Fourteenth Amendments do not require use of the "beyond a reasonable doubt" standard in obscenity cases). Thus, even assuming that there is a factual component to the rational basis equal protection inquiry that calls for application of a burden of proof, this Court's decisions make clear that the "beyond a reasonable doubt" standard is wholly inapposite.

At bottom, the Alabama Supreme Court appears to have confused the rigorous *substantive* standard imposed on rational basis plaintiffs (requiring proof that the state classification is arbitrary) with the *evidentiary* standard (if any) used to assess those claims. In doing so, the court imposed a burden on equal protection plaintiffs that is unique in civil litigation. And by superimposing the strictest burden of proof on top of the already difficult substantive burden borne by those plaintiffs, the court rendered rational basis scrutiny an empty exercise. Because the approach taken below cannot be squared with this Court's holdings — and because it involves an error that has infected review of

federal constitutional claims in many other States — further review is warranted.[15]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

RICHARD A. BALL, JR.
FRED B. MATTHEWS
Ball, Ball, Matthews & Novak, P.A.
Post Office Box 2148
Montgomery, AL 36102
(334) 387-7680

KENNETH S. GELLER
Counsel of Record
CHARLES ROTHFELD
JAMES M. OLESKE, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

JUNE 1999

---

[15] We note that, before its discussion of the rational basis test, the Alabama Supreme Court stated that the tax credits do "not discriminate" because all "taxpayers who meet the clear and objective criteria have been treated equally." App., *infra*, 9a. This portion of the court's opinion appears to relate only to the question of the tax credits' validity under state law. But to the extent that this conclusion was intended to apply to the petitioners' federal claim, it is in direct conflict with this Court's decision in *Williams*, 472 U.S. at 27 ("[T]he fact that all those not benefited by the challenged exemption are treated equally has no bearing on the legitimacy of that classification in the first place. A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated.").

APPENDIX A

SUPREME COURT OF ALABAMA

No. 1961555

STATE OF ALABAMA, ET AL.

v.

ALABAMA MUNICIPAL INSURANCE CORPORATION, ET AL.

Appeal from Montgomery Circuit Court
(CV-95-516)

May 22, 1998

MADDOX, Justice.

This appeal involves a question of the constitutionality of Alabama statutes that create tax credits in favor of insurance companies that issue property and casualty insurance policies. Eight insurance companies contend that §§ 27-4A-3(a)(3)d.1. and d.2., ALA. CODE 1975, which create tax credits that result in a reduction of the insurance premium tax, are discriminatory when applied and that they, therefore, violate §§ 1 and 35 of the Alabama Constitution of 1901 and/or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The parties raise the following specific questions:

(1) Did the trial court apply the appropriate principles of law in ruling on the constitutionality of the tax credits?

(2) Does the State's granting of the tax credits violate either the Alabama Constitution or the United States Constitution?

(3) If the tax credit statutes are held to be unconstitutional, should they be severed from the premium tax statute? and

(4) Whether the trial court, upon determining that the tax credits were unconstitutional, erred in applying that determination quasi-prospectively?

FACTS AND PROCEDURAL HISTORY

In the early 1980s, a group of foreign insurance companies challenged the constitutionality of the insurance premium tax then in effect, on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The tax scheme then in effect imposed either a 3% or a 4% premium tax on an out-of-state insurer, depending on the kind of insurance the company sold, but only a 1% tax on a domestic insurer, without regard to the kinds of insurance the domestic company sold. Although the Alabama statutes then applicable allowed for the reduction of the tax rate on foreign insurers if those companies met certain requirements (e.g., investing a percentage of their assets in Alabama), there was no method under the old taxing scheme for a foreign insurer to achieve parity with a domestic insurer on the tax rate charged on premium collections.

Alabama's old taxing scheme was challenged on constitutional grounds in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985). The United States Supreme Court held that Alabama's insurance premium taxing scheme was unconstitutional, on the ground that it discriminated against foreign insurers.

After the Supreme Court rendered its decision in *Ward*, the out-of-state insurance companies involved in that case entered into a settlement with the State. Under the terms of the settlement agreement, the out-of-state companies, as plaintiffs, consented to the dismissal of their action in exchange for legislation that would redesign the tax system relating to the insurance premium tax. Accordingly, the Legislature enacted the Insurance Premium Tax Reform Act of 1993 (the "Act") (Act No. 93-679, ALA. ACTS 1993;

codified at ALA. CODE 1975, § 27-4A-1 to -7); that Act contains the sections that the eight plaintiffs in this case now challenge as violating both the State Constitution and the Federal Constitution.

Because the Act made major revisions to the State's premium taxing scheme, we briefly describe how it was designed to be applied. The Act first provided that every insurer, whether foreign or domestic, is taxed at a rate of 3.6% on property and casualty insurance premium income. Despite the equalization of the basic premium tax rates under the new system, the plaintiffs filed this action in the Montgomery Circuit Court in March 1995, against the State and Michael DeBellis, insurance commissioner for the State of Alabama (collectively the "State"), charging that the new tax system violates the Fourteenth Amendment to the United States Constitution and §§ 1 and 35 of the Alabama Constitution. Specifically, they charged that two tax credits included in the premium tax statute are discriminatory and, therefore, unconstitutional.

The plaintiffs first challenged the tax credit designated as the "Alabama Insurance Office Facilities Credit" (the "Office Credit"), which provides for incremental reductions in an insurer's tax rate for each office that it operates within the state, with the amount of the reduction per office dependent on the number of employees working in that office.[1] The

---

[1] The statute provides:

"1. Alabama Insurance Office Facilities Credit.

"For each office owned or leased by an insurer in the State of Alabama and used for insurance operations, an insurer shall be entitled to a credit against the [premium tax] according to the following schedule:

plaintiffs also challenged the tax credit designated as the "Alabama Real Property Investment Credit" (the "Property Credit"), which provides for incremental reductions in an insurer's tax rate based on the amount of investment in real property the insurer has made within Alabama.[2]

The trial court held that the tax credit formula was unconstitutionally discriminatory because it was easier for larger companies with more offices and more employees to take advantage of the tax credit. The trial court specifically held:

Number of Full Time Employees in Office	**Credit as a % of Premiums Taxable under Paragraph a.**
1-3	0.0025%
4-10	0.0050%
11-50	0.0075%
51 or more	0.0100%

"The total credit allowable for Alabama insurance office facilities shall not exceed one percent of an insurer's Alabama premiums taxable at the rate specified in paragraph a. of this subdivision (3)." § 27-4A-3(a)(3)d.1., ALA. CODE 1975.

[2] The statute provides:

"2. Alabama Real Property Investment Credit.

"For each $1,000,000 in value of real property investments in the State of Alabama, an insurer shall be entitled to a credit of 0.10 percent of its Alabama premiums taxable at the rate specified in paragraph a. of this subdivision (3). The total credit allowable for Alabama real property investments shall not exceed 1 percent of an insurer's Alabama premiums taxable at the rate specified in paragraph a. of this subdivision (3)."

§ 27-4A-3(a)(3)d.2., ALA. CODE 1975.

"The [statutory] section under scrutiny taxes property and casualty premium income (with certain exceptions) at 3.6%. Section 27-4A-3(a)(3)d.1. provides incremental credit up to 1% for a specified number of offices staffed by a specified number of employees. Section 27-4A-3(a)(3)d.2. provides a credit of .1% for each one million dollars invested in real estate in Alabama up to an investment of ten million dollars or a maximum credit of 1%.

". . . .

"Under the taxing statute, it is easier for a large company to take advantage of the [Property Credit] than a small one. A company with less than one hundred million dollars in assets is effectively prohibited from investing as much as ten million dollars in real estate by § 27-41-34 . . . . Similarly, it is easier for a company doing a large amount of business in Alabama through employees to take advantage of the [Office Credit], than a small one doing business through independent agents. The minimum number of offices a company must have to achieve the full credit is 100, staffed by 51 employees each, or a total of 5,100 employees . . . . The taxing classification thus favors larger companies and concurrently burdens smaller ones.

". . . .

"This Court finds and concludes that the subject tax discriminates in favor of large companies and burdens small ones. . . . The State suggests that if anything is held unconstitutional, it should be the credits . . . . The Court finds that the credits are an integral part of the section taxing property and casualty companies and cannot be severed from it."

Because the trial court held that the two credits were integral to the premium taxation scheme, it held the entire

premium tax unconstitutional and ordered refunds for the plaintiffs; it did not order refunds for similarly situated insurance companies, holding instead that its judgment was to be prospectively applied to all other such companies.

The trial court held that the challenged tax credits violated what it called the "equal protection" provisions of the Alabama Constitution, i.e., §§ 1 and 35, and accordingly did not reach the question whether they also violated the United States Constitution.

The defendants appealed. We have carefully reviewed the briefs of the parties and have carefully considered the oral arguments. Based on the reasons discussed below, we reverse and remand.

DISCUSSION

In our analysis of whether the challenged tax credits violate §§ 1 and 35 of the Alabama Constitution, we must first note that, as a general principle, acts of the legislature are presumed by this Court to be valid and that this Court "seek[s] to sustain rather than strike down the enactment of a coordinate branch of the government" and that it will not hold such an act unconstitutional "unless it is clear beyond reasonable doubt that [the act violates] the fundamental law." *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944). In *McAdory*, this Court also stated that when a court is passing upon the constitutionality of a legislative act, "questions of propriety, wisdom, necessity, utility, and expediency [of the act] are held exclusively for the legislative bodies, and are matters with which the [court has] no concern." 246 Ala. at 9, 18 So. 2d at 815.

Regarding the taxing power, we also note that "'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.'" *Thorn v. Jefferson County*, 375 So. 2d 780, 786 (Ala.1979), quoting *Madden v.*

Kentucky, 309 U.S. 83, 88, 60 S. Ct. 406, 84 L. Ed. 590 (1940). This Court has discussed the taxing power as follows:

> "[T]he power to tax is essentially an attribute of sovereignty conferred by the people, through the constitution, on the state, and is vested in the legislative department. . . . Legislative classifications in tax matters are presumably valid, the burden being on the challenger to prove that such a classification or subclassification does not rest on a reasonable basis and such statutes are not to be deemed unconstitutional or invalid if any state of facts can be conceived which would support the subject of the tax."

Haden v. Watson, 270 Ala. 277, 281, 117 So. 2d 694, 696 (1960). Similarly, as the Court of Civil Appeals has written:

> "The power of the legislature to exempt from taxation unless restricted by express constitutional provisions is as broad as its power to tax. The legislature is free to exempt according to its views of public policy and expediency.

Barron-Leggett Elec., Inc. v. Department of Revenue, 336 So. 2d 1124, 1127 (Ala. Civ. App. 1976) (citations omitted).

The burden the plaintiff must meet in showing that a taxation statute is unconstitutional is stringent.

> "It is the law, of course, that a party attacking a statute has the burden of overcoming the presumption of constitutionality, of negativing every conceivable or reasonable basis which might support the classification, and of showing clearly that the statute is unjustly discriminatory or that the classification is essentially arbitrary or unreasonable. Discrimination is the essence of classification and does violence to the constitution only when the basis of the discrimination is unreasonable."

Thorn, 375 So. 2d at 787.

The plaintiffs here urge this Court to apply the "means-ends" test of State ex rel. *Galanos v. Mapco Petroleum, Inc.*, 519 So. 2d 1275 (Ala. 1987), to the facts of this case. As the State correctly points out, this Court has not previously applied the "means-end" test to cases involving the constitutionality of taxation statutes. In *Mapco*, this Court enunciated a rule to be used in determining whether certain statutes violated the protections embodied in the Alabama Constitution. However, a review of *Mapco* makes it evident that this Court was not in that case formulating a test for determining whether taxation statutes were constitutional. In a thorough opinion, the *Mapco* Court examined the development of constitutional analysis of economic statutes, but it did not discuss the long line of cases in which this Court has considered the constitutionality of taxation statutes. Further, in that section of *Mapco* where this Court set out the test described by some as the "means-ends" test, this Court introduced that test with the following:

> "After due reflection, we determine that the following standard should be applied in review of a challenge such as this one to the constitutionality of legislation prohibiting sales below cost in the attempt to prevent monopolization...."

519 So. 2d at 1284. Based upon our understanding of this Court's holding in *Mapco*, we can conclude only that in that case this Court did not overrule its long line of precedents governing our consideration of the constitutionality of taxing statutes.

Having determined that we should not apply the *Mapco* test, we apply the principles this Court has previously applied in cases involving questions of the constitutionality of taxation statutes. Applying those principles, we conclude that it is not clear beyond a reasonable doubt that the tax credits at issue

violate either the Alabama Constitution or the Federal Constitution.

The plaintiffs have not shown that, because they are unable to take advantage of the tax credits, the application of the tax credits has produced an inequality that is "actually and palpably unreasonable and arbitrary." *McAdory*, 246 Ala. at 12, 18 So. 2d at 817. The statute in question imposes a flat premium tax rate on all insurers, foreign and domestic, without exception. The credits challenged are based on objective, clearly ascertainable criteria. Although we recognize that some companies are economically unable at this time to qualify for the credits, we must also recognize that their inability to qualify is a result of their own business decisions and their own economic performance. We are not unaware of the argument that some insurers are prevented from investing the maximum amount in Alabama real estate because their total assets are too low. However, we note that the conditions prevailing today are not necessarily constant. Those companies could grow and thus be able to invest more. We find persuasive the State's argument that the statute does not discriminate, in that it does not create classes of insurers to be treated differently from other classes.

A statement of the Minnesota Supreme Court, in a case where it rejected an equal protection challenge to a taxing statute, could be applied in this case:

> "Furthermore, any difference of effect that may have arisen from the [statute] is the result, not of discriminatory treatment, but of the unique financial situation of individual insurance company taxpayers."

John Hancock Mutual Life Ins. Co. v. Commissioner of Revenue, 497 N.W.2d 250, 254 (Minn. 1993). In this present case, the insurance company taxpayers who meet the clear and objective criteria have been treated equally.

A party challenging a tax statute as unconstitutionally discriminatory must show that the discrimination embodied in the taxing statute is unreasonable and must negate every factor offered as a reasonable basis supporting the classification. The plaintiffs have not met that heavy burden in this case; therefore, we reject the plaintiffs' argument that the challenged tax credits violate the provisions of the Constitution of Alabama.

Although the trial court did not reach the question whether the challenged tax credits violate the Equal Protection Clause of the United States Constitution, we note that the federal constitutional issue was argued before this Court in the parties' briefs and at oral argument. Furthermore, if this case were remanded to the trial court for further consideration, that court would necessarily have to rule on the federal constitutional issue. Therefore, we have decided to address that issue now.

When a court is analyzing the constitutionality of a taxation statute under Equal Protection Clause jurisprudence, the appropriate test for the court to apply is the "rational relationship" test. *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 657, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981). Under that test, a court must ask whether a challenged statute "is rationally related to achievement of a legitimate state purpose." *Id.* The key question in determining whether the challenged statute meets that test has been subdivided by the Supreme Court of the United States as follows: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Id.* at 668, 101 S. Ct. 2070.

Taxpayers arguing that a state taxation statute violates the Equal Protection Clause of the Federal Constitution carry a heavy burden. For example, the Supreme Court has stated

that "[p]arties challenging legislation under the Equal Protection Clause cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which [the court] may take judicial notice, that the question [whether the rational relationship test was met] is at least debatable.'" *Id.* at 674, 101 S. Ct. 2070, quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).

The Act creating the tax credits challenged here was adopted in direct response to the decision of the United States Supreme Court in *Ward*. The State contends that one of the purposes of the legislation was to encourage competition among insurers in rural areas of the state, thereby providing greater access to insurance for citizens of rural areas. This goal, the State argues, is met because insurers will be encouraged by the Office Credit to open more offices in the state, some of which will presumably be in areas not already dominated by their competitors, i.e., in rural areas. The State also argues that the Office Credit was designed to encourage the employment of Alabama citizens. The State contends that the Property Credit is designed to encourage all insurance companies, foreign and domestic, to invest in Alabama property.

Upon our consideration of the arguments made by the State and those made by the plaintiffs, and in light of the standards set out above, we conclude that the challenged credits do not violate the Equal Protection Clause of the Fourteenth Amendment. The tax credits employed reasonable classifications designed to reach the legitimate legislatively determined goals of encouraging investment in the state and encouraging insurers to employ Alabama citizens and to open offices in rural areas. Whether the challenged tax credits are rationally related to these goals is "at least debatable." It was reasonable for the members of the legislature to believe that these goals would be promoted by the adoption of the credits. Consequently, we conclude that the challenged credits do not

violate the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

CONCLUSION

The plaintiffs principally argue that the trial judge's ruling should be affirmed because, they say, the property and casualty section of the 1993 Act—i.e., § 27-4A-3(a)(3)—was structured to benefit "large" property and casualty insurers and unconstitutionally intrudes on their "economic rights."

The State's argument is summed up in its reply brief, as follows:

> "The [Insurance] Premium Tax Reform Act [of 1993] and the credits contained therein are both constitutional. The credits do not discriminate; they are available to every insurer that makes the same investment in the Alabama economy. The [Property Credit] encourages insurers to invest in real estate because by doing so, they can reduce their tax burden. Similarly, the [Office Credit] encourages insurers to hire new employees, or to open new offices, because by doing so, the insurers can reduce their tax burden. To the extent that the plaintiffs do not presently take advantage of the entire credit, they are encouraged to expand their businesses. The credits are there for them. That, quite simply, is the factual picture. And, assuming *arguendo* that the credits do discriminate between 'large' and 'small' property and casualty insurers, it is more than clear that under the rational relation [test] or the [state constitutional standards], the [Insurance] Premium Tax Reform Act is a constitutional statute. The [plaintiffs'] argument to the contrary is a constitutional challenge in name only. The [plaintiffs'] quarrel with the Act is at heart a policy debate; they argue that the credits are not optimal economic incentives. This Court has repeatedly stated that it will not be used to revise statutes in order

to foster private notions of economic efficiency and efficacy."

After considering all of the arguments, we agree with the State that under either the rational relationship test or the tests applied in determining compliance with the Alabama Constitution of 1901, the plaintiffs have not shown that the challenged statute is unconstitutional. Under settled principles of law, a court cannot substitute its judgment for that of the people's elected representatives. We conclude that the challenged tax credits have not been shown to violate either the Alabama Constitution or the Federal Constitution; we reverse the judgment of the trial court and remand the cause for further proceedings or an order consistent with this opinion.

Because we reverse and remand, we need not consider the remaining questions presented by the parties concerning severability and prospective or quasi- prospective application of the trial court's ruling.

REVERSED AND REMANDED.

HOOPER, C.J., and SHORES and KENNEDY, JJ., concur.

HOUSTON and LYONS[3], JJ., concur in part and concur in the result in part.

SEE, J., concurs in the result.

HOUSTON, Justice (concurring in part and concurring in the result in part).

I concur in the result. It is my firm and unwavering judicial opinion that the Constitution of Alabama of 1901 does not provide for equal protection, and that in Alabama, since

---

[3] Justice Lyons was not a member of the Court when the case was orally argued, but he has listened to the tape of the oral arguments.

the ratification of the 1901 Constitution, the only equal protection is that provided by the 14th Amendment to the Constitution of the United States. *Smith v. Schulte*, 671 So. 2d 1334, 1338-39 (Ala. 1995) (Houston, J., dissenting); *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 901-10 (Ala. 1995) (Houston, J., concurring in the result); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 174-81 (Ala. 1991) (Houston, J., concurring in the result).

I refuse to strike down a duly enacted statute based upon a nonexistent constitutional provision.

LYONS, J., concurs.

APPENDIX B

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

ALABAMA MUNICIPAL INSURANCE CORPORATION; ET AL.	*	
Plaintiffs,	*	
v.	*	CASE NO. CV-95-516-PR
STATE OF ALABAMA; ET AL.	*	
Defendants.	*	

JUDGMENT

This cause came on for trial and on consideration of the evidence and law, the Court makes the following findings of fact and conclusions of law.

This cause involves a constitutional challenge of the insurance premium tax on property and casualty insurance companies in The Insurance Premium Tax Reform Act of 1993 (Acts 1993, No. 93-679). The Plaintiffs are eight property and casualty companies doing business in Alabama. They contend that the section of the Act applicable to property and casualty companies, § 27-4A-3(a)(3) *Code of Alabama*, 1975, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and similar provisions of the 1901 Alabama Constitution, because it creates unlawful classifications among taxpayers.

The section under scrutiny taxes property and casualty premium income (with certain exceptions) at 3.6%. Section 27-4A-3(a)(3) d.1 provides incremental credit up to 1% for a specified number of offices staffed by a specified number of employees.[1] Section 27-4A-3(a)(3) d.2 provides a credit of .1% for each one million dollars invested in real estate in Alabama up to an investment of ten million dollars or a maximum credit of 1%.[2]

---

[1] 1. Alabama Insurance Office Facilities Credit

For each office owned or leased by an insurer in the State of Alabama and used for insurance operations, an insurer shall be entitled to a credit against the tax imposed by paragraph a. of this subdivision (3) according to the following schedule:

Number of Full Time Employees in Office	**Credit as a % of Premiums Taxable Under Paragraph a.**
1 - 3	0.0025%
4 - 10	0.0050%
11 - 50	0.0075%
51 or more	0.0100%

The total credit allowable for Alabama insurance officer facilities shall not exceed one percent of an insurer's Alabama premiums taxable at the rate specified in paragraph a. of this subdivision (3).

[2] 2. Alabama Real Property Investment Credit

For each $1,000,000 in value of real property investments in the State of Alabama, an insurer shall be entitled to a credit of 0.10 percent of its Alabama premiums taxable at the rate specified in paragraph a. of this subdivision (3). The total credit allowable for

The evidence presented at trial demonstrates without dispute that Alfa Mutual Insurance Company qualified for the maximum 1% Office Facilities Credit for the year 1995 through its office configuration and staffing. The evidence further demonstrates that Alfa qualified for the 1% maximum Real Estate Investment Credit through an investment of over ten million dollars in Alabama real estate. For 1995, Alfa had $298,015,564 in Alabama premium income subject to the 3.6% tax and by qualifying for both credits, reduced its tax rate to 1.6%. By so doing, it reduced its tax from $10,728,560 to $5,960,311. In 1995, Alfa had assets of $781,448,000 and more than 842 employees located in 152 offices in Alabama. Of the plaintiffs, only Southern Guaranty Insurance Company had more than $100,000,000 in assets. The value of the assets of the seven other plaintiffs range from $1,972,000 in the case of Liberty Southern Insurance Company to $27,332,000 in the case of Centennial Casualty Company. The positive premium income for the eight plaintiffs in Alabama ranges from $342,716 for Centennial Casualty Company to $13,167,820 for Safeway Insurance Company of Alabama. Six of the Plaintiffs have one office in Alabama and two have two. Two have no employees and the others range from one to 29, except Southern Guaranty which has 115.

Alfa is the only property and casualty company which qualifies for the full 2% credit. Allstate Insurance Company and the State Farm Group qualify for 1.17% and 1.215%, respectively. State Farm, Alfa and Allstate were the three biggest property and casualty companies in Alabama for 1995

Alabama real property investments shall not exceed 1 percent of an insurer's Alabama premiums taxable at the rate specified in paragraph a. of this subdivision (3).

in terms of premium income. No other property and casualty company realized a substantial benefit from the credits.

Of the plaintiff companies, two realized no credit. The credit realized by five plaintiffs ranges from .0025% to .02%. Southern Guaranty Insurance Company realized .3125% credit.

Under the taxing statute, it is easier for a large company to take advantage of the Real Estate Investment Credit than a small one. A company with less than one hundred million dollars in assets is effectively prohibited from investing as much as ten million dollars in real estate by § 27-41-34 *Code of Alabama*, 1975. Common business practices and prudence render the investment of, say, one million dollars in real estate more difficult for a company with ten million dollars in assets than for a company with five hundred million dollars in assets. Similarly, it is easier for a company doing a large amount of business in Alabama through employees to take advantage of the Office Facilities Credit, than a small one doing business through independent agents. The minimum number of offices a company must have to achieve the full credit is 100, staffed by 51 employees each, or a total of 5,100 employees. Alternatively, a company could have a minimum of 400 employees in 400 offices and realize the 1% credit. Each incremental fractional amount of Office Facilities Credit is more difficult to achieve for a small company doing business through independent agents than a large one doing business through employees. The taxing classification thus favors larger companies and concurrently burdens smaller ones.

The issue for this Court is whether this classification violates either the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or similar clauses in the 1901 Alabama Constitution.

This Court is mindful of the broad area of discretion available to the Legislature in tax matters. This Court cannot substitute its preference merely because it disagrees with the legislative scheme.

The Alabama Supreme Court in *Robert Burton Associates, Ltd., et al. v. Ralph P. Eagerton, Jr., etc.*, 432 So. 2d 1267 (Ala. 1983) stated:

> 'The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'

The Alabama Legislature provided no express purpose for the subject legislation. The State has postulated a number of conceivable purposes. The State's conceivable purposes fall into two broad categories. The first involves economic development including the promotion of insurance offices, employment and the insurance industry generally. The second involves the promotion of the availability of insurance, the encouragement of its use and the promotion of a vigorous insurance market. The analysis from a U.S. Equal Protection Clause standpoint is whether the classification has a fair and substantial relation to any asserted legitimate purpose. The analysis from the standpoint of Alabama Constitution 1901 is different. State scrutiny is more vigorous. Where the legislation affects protected economic interest or liberties, there must be in fact a demonstrable public need to be balanced against protected interest impaired by the legislation and the balance struck between the two must be reasonable and fair. *Mount Royal Towers v. Alabama Board of Health*, 388 So. 2d 1209 (Ala. 1980).

Both the Real Estate Investment and Office Facilities Credit may be achieved by pre-legislative activity. In fact, it appears that Alfa Mutual Insurance Company achieved both credits through real estate investment and an office staffing situation, that existed at the time of the passage of the Act. See *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985). The State claims that the legislation will result in considerable economic benefits such as construction and employment. The Act contains no requirement that there be economic activity as a condition to achieving either credit. The evidence shows that considerable economic activity must occur before the cost to the State of the subject credits is overcome. Only then would there be a net economic benefit to the State. The relationship between these economic goals and the classification is attenuated. See *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d. 1 (1992). Also see *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 84 L. Ed. 2d 745, 105 S. Ct. 1676 (1985); *Town of Eclectic v. Mays*, 547 So. 2d 96 (Ala. 1989); *City of Birmingham v. Stegall Co., Inc.*, 439 So. 2d 91 (Ala. 1983); *Robert Burton Associates, Ltd., et al. v. Ralph P. Eagerton, Jr., etc.*, supra; *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979). The credit allowed under this legislation for the specified office configuration and staffing by employees is in part a tax on the method of doing business by those companies which do not achieve the credit. See *Rochell v. City of Florence*, 237 Ala. 635, 188 So. 247 (1939). The evidence is conclusive that the legislation ultimately provides a subsidy for Alfa and to a lesser extent Allstate and State Farm and as such, does not encourage vigorous competition, but tends to encourage monopoly inconsistent with Article IV, § 103, Alabama Constitution 1901. The classification also appears to be inconsistent with settled state law or policies concerning the sound solvency

regulation of insurance companies, free competition and fundamental economic rights. As such, some asserted purposes could be considered pretextual. See *Nordlinger v. Hahn*, supra; *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989); *City of Council of Montgomery v. Kelly*, 142 Ala. 552, 38 So. 67 (1904); *State of South Dakota v. American Bankers Insurance Company*, 374 N.W. 2d 609 (S.D. 1985).

The State argues that distinctions based on size are constitutionally permitted, citing *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495, 57 S. Ct. 868, 81 L.Ed 1245 (1937); *Eagerton v. Exchange Oil & Gas Corp.*, 404 So. 2d 1 (Ala. 1981); *National Motor Fleets, Inc. v. Brown*, 282 Ala. 572, 213 So. 2d 570 (1968); *Caiola v. City of Birmingham*, 262 So. 2d 602 (Ala. 1972); *State v. Pure Oil Co.*, 256 Ala. 534, 55 So. 2d 843 (1951). In *Caiola*, it was stated:

> "For example, where size is an index to the evil at which the law is directed, discrimination between large and small are permissible."

In *Carmichael*, it was stated:

> "It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between proprietors of large businesses who are taxed and proprietors of small businesses who are not." *Carmichael*, pg. 1253.

These case do not justify a greater tax burden on smaller, poorer companies but rather justify a higher burden on those

with a greater ability to pay. See reasoning in *Kahn v. Shevon*, 416 U.S. 351, 40 L. Ed. 189, 94 S. Ct. 1734 (1974); *Stewart Dry Goods Company v. John B. Lewis, et al.*, 294 U.S. 550 (1935) and *Fox v. Standard Oil Company of New Jersey*, 294 U.S. 87, 79 L. Ed. 780 (1935).

Upon consideration of all of the evidence and applicable law, the Court finds and concludes that for the reasons hereinafter stated, it is unnecessary to reach the issue of whether the subject legislation violates the U.S. Constitution. This case involves a protected economic interest or liberty under Alabama Constitution 1901, §§ 1 and 35. This right was recognized in *City Council of Montgomery v. Kelly*, 142 Ala. 552, 38 So. 67 (1905):

> "The above cited cases are in accord with our decisions which hold that the liberty which is so sedulously guarded by the Constitution, includes the right to pursue any useful and harmless occupation, and to conduct the business in the citizens' own way, without being discriminated against either by being prohibited from engaging in it or by being burdened with discriminative taxation. * * * "

In *Alabama Independent Service Station Association v. McDowell*, 242 Ala. 424, 6 So. 2d 502 (1942), it was stated:

> "The doctrine of the Kelly case has been repeatedly followed, not only by this court but by the courts of other states. *State v. Goldstein*, supra; *City of Mobile v. Rouse*, 233 Ala. 622, 623, 173 So. 266, 111 A.L.R. 349; *People v. Victor*, supra, and authorities cited on pages 669, 670 of 283 N.W.
>
> "Said Act 607, in the respect indicated, violates the provisions of our Bill of Rights, Const. 1901, §§ 1 and

35; *City Council of Montgomery v. Kelly*, supra, *State v. Goldstein*, 207 Ala. 569, 93 So. 308; *City of Mobile v. Rouse*, supra; *Barton v. City of Bessemer*, 234 Ala. 20, 173 So. 626."

In *Mount Royal Towers v. Alabama Board of Health*, 388 So. 2d 1209 (Ala. 1980), it was stated:

> "We hold that, where legislation affects protected economic interests or liberties, it must be tested against the public purpose sought to be served, and there must be a legitimate bona fide relationship between a permissible public purpose and legislation passed to further that end. Or, stated differently, there must be in fact a demonstrable public need to be balanced against protected interests impaired by legislation, and the balance struck between individual rights and the public welfare must be reasonable and fair. Factors which may be taken into account in this assessment are the degree of the burden which the legislation imposes, the importance of the right infringed upon, and the gravity of the conditions with which the legislation attempts to deal. This is not a departure from the rule followed in earlier cases, but merely a rearticulation of the test. *Franklin* itself, which established the affected public interest test, defined the issue in determining the validity of economic regulation attacked upon constitutional grounds to be 'whether the relief intended to be given is of a character appropriate to the existing emergency, and reasonably intended to protect against, or to alleviate, the calamitous conditions prevailing or threatened.' 169 So. at 298."

The reasoning in *Mount Royal* has been affirmed in *State Ex Rel. Galanos v. Mapco Petroleum*, 519 So. 2d 1275 (Ala. 1987).

The above and foregoing federal cases are persuasive and helpful in this Court's analysis of the State constitutional challenge. This Court finds and concludes that the subject tax discriminates in favor of large companies and burdens small ones. The Court finds no demonstrable public need which could justify such discrimination under the means-end test set forth in *Mapco* and *Mount Royal*.

The Plaintiffs seek a holding that § 27-4A-3(a)(3) is unconstitutional. The State suggest that if anything is held unconstitutional, it should be the credits. The issue of severability is governed by *Baron-Leggett Electric, Inc. v. Department of Revenue*, 336 So. 2d 1124 (Ala. Civ. App. 1976). The Court finds that the credits are an integral part of the section taxing property and casualty companies and cannot be severed from it. There is no evidence that the Legislature would have enacted the section without the credits in it. There is considerable evidence that the section would never have been passed without the credits in it. Accordingly, it is the holding of this Court that § 27-4A-3(a)(3) *Code of Alabama*, 1975 is unconstitutional and void under Alabama Constitution 1901 §§ 1 and 35.

The State argues that the retroactive application would cost the State $91,000,000 annually in premium tax collections. A prospective application of this ruling would cost the State no tax revenues provided the Alabama Legislature acts in a timely fashion. A quasi prospective application of this ruling would operate similar to a prospective one, but would afford relief to the plaintiffs in this case. Decisions with respect to retroactive or prospective application of rulings on constitutional law are subject to judicial discretion on a case-by-case basis. *Hosea O. Weaver & Sons, Inc. v. Towner*, 663 So. 2d. 892 (Ala. 1995); *State v. Morrison Cafeterias Consolidated, Inc.*, 487 So. 2d 898

(Ala. 1985). The equities of this case do not support the imposition of a severe financial burden on the State of Alabama and its citizens, therefore, there shall be no retroactive application of this ruling. The equities do dictate that the present Plaintiffs be rewarded and that similar litigants be provided an incentive to challenge existing law in need of reform.

Therefore, it is ORDERED, ADJUDGED and DECREED as follows:

1. That § 27-4A-3(a)(3) *Code of Alabama*, 1975 is unconstitutional as violative of Alabama Constitution 1901 §§ 1 and 35.

2. The Plaintiffs, Alabama Municipal Insurance Corp., American Colonial Insurance Co., Inc., American Mining Insurance Co., Inc., Baldwin Mutual Insurance Co., Centennial Casualty Co., Liberty Southern Insurance Co., Inc., Safeway Insurance Co. of Alabama, Southern Guaranty Insurance Co., are entitled to a refund of all taxes paid under and by virtue of the provisions of § 27-4A-3(a)(3) *Code of Alabama*, 1975 and the Clerk of this Court is hereby ordered to refund to the parties the taxes heretofore paid into Court. Said Plaintiffs are hereby relieved of making any further tax payments under said section.

3. As to all other taxpayers, this ruling shall apply prospectively and all taxes due from said taxpayers due as of this date shall be due and owing the State of Alabama and shall not be refunded. Hereafter Section 27-4A-3(a)(3) *Code of Alabama*, 1975 shall be void and no taxes shall be collected under it.

DONE this 11 day of June, 1997.

/s/ Charles Price
CIRCUIT JUDGE

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

February 19, 1999

No. 1961555

STATE OF ALABAMA, ET AL.

v.

ALABAMA MUNICIPAL INSURANCE CORPORATION, ET AL.

(Montgomery Cir. Ct. No.: CV-95-516)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

MADDOX, J. - Hooper, C.J., and Houston, Kennedy, See, Lyons, and Brown, JJ., concur.

APPENDIX D

CODE OF ALABAMA

Section 27-4A-3. Premium taxation rates.

(a) Subject to the exceptions and exemptions hereinafter set forth, for the year beginning on January 1, 1995, and for each year thereafter, every insurer shall pay to the commissioner a premium tax equal to the percentage, as set out in this subsection (a), of the premiums received by the insurer for business done in this state, whether the same was actually received by the insurer in this state or elsewhere:

* * *

(3) Premium Tax on Other Insurance Premiums.

a. Except as hereinafter provided, the rate of taxation on insurance other than life insurance, health insurance, and accident health insurance shall be 3.6 percent per annum.

b. Premiums for all of the following types of insurance shall be taxed at the rate of one percent per annum:

1. All property and multi peril insurance written in fire protection Classes 9 and 10.

2. Mobile homes, mobile homeowners, homeowners and low value dwelling policies in a face amount of $40,000 or less.

c. Premiums for medical liability insurance shall be taxed at the rate of 1.6 percent per annum.

d. The tax imposed at the rate specified in paragraph a. of this subdivision (3) shall be reduced by the following credits for certain economic development activities pursued in the State of Alabama.

1. Alabama Insurance Offices Facilities Credit.

For each office owned or leased by an insurer in the State of Alabama and used for insurance operations, an insurer shall be entitled to a credit against the tax imposed by paragraph a. of this subdivision (3) according to the following schedule:

Number of Full Time Employees in Office	**Credit as a % of Premiums Taxable Under Paragraph a.**
1 - 3	0.0025%
4 - 10	0.0050%
11 - 50	0.0075%
51 or more	0.0100%

The total credit allowable for Alabama insurance office facilities shall not exceed one percent of an insurer's Alabama premiums taxable at the rate specified in paragraph a. of this subdivision (3).

2. Alabama Real Property Investment Credit.

For each $1,000,000 in value of real property investments in the State of Alabama, an insurer shall be entitled to a credit of 0.10 percent of its Alabama premiums taxable at the rate specified in paragraph a. of this subdivision (3). The total credit allowable for Alabama real property investments shall not exceed 1 percent of an insurer's Alabama premiums taxable at the rate specified in paragraph a of this subdivision (3).

(i) Alabama real property investments which qualify for the Alabama real property investment credit include any improved Alabama real property owned by the insurer or an affiliate of the insurer on January 1, 1993, and any improved or unimproved Alabama real property acquired

or new construction placed in service on or after January 1, 1993, by the insurer or an affiliate of the insurer.

(ii) For purposes of determining the Alabama real property investment credit, Alabama real property investments shall be valued at cost and not at book value or fair market value. The cost of capital improvements to existing Alabama real property investments, such as the renovation of shopping centers, hotels, or other buildings, completed and placed in service by the insurer or an affiliate of the insurer on or after January 1, 1993, shall be considered an Alabama real estate investment.

(iii) For purposes of determining the value of Alabama real property investments, funds borrowed to finance Alabama real property investments shall be subtracted from cost so that only the net cost in the investment properties borne from assets belonging to the insurer or an affiliate of the insurer qualifies for the Alabama real property investment credit. The cost of debt-financed Alabama real property investments of an insurer shall be increased pro tanto as the underlying debt is paid off by the insurer or an affiliate of the insurer.

(iv) The Alabama real property investment credit shall not be allowed for properties in the State of Alabama used in an insurer's insurance operations and for which the Alabama insurance office facilities credit is allowed or allowable, without regard to the 1 percent limitation on the credit. However, the cost of real property owned in the Statute of Alabama and used in part as an Alabama real property investment and in part for the insurer's insurance operations shall be allocated on a square-foot basis so that the cost allocated to that portion of the property not used for insurance operations shall qualify for the Alabama real property investment credit.

(v) Mortgages held by an insurer that are secured by real property located in the State of Alabama shall not be considered Alabama real property investments for purposes of the Alabama real property investment credit.

3. Special Rules.

The following special rules apply to the Alabama insurance office facilities credit and the Alabama real property investment credit.

(i) For purposes of determining the economic development credits allowed under this section, the term affiliate shall mean any business entity, other than a life or health insurance company, which is wholly owned by the insurer subject to tax under paragraph a. of this subdivision (3) or any other insurer and its wholly owned subsidiaries, other than a life or health insurance company, which is part of a group of companies, including the insurer, which are under common control and management. For an insurer having affiliates, all premiums of the insurer and its insurance company affiliates subject to tax at the rate specified in paragraph a of this subdivision (3) may be aggregated; all Alabama insurance office facilities and all Alabama real property investments may be aggregated; and, subject to the specific credit limitations, the total allowable tax credits may be determined as if all the aggregated premiums, office facilities and Alabama real property investments were owned by one insurer. Once the total allowable credits have been determined, the credits may be allocated to the insurer and its insurance company affiliates at the sole discretion of the insurer subject to the specific credit limitations on a per insurance company basis. The computation of allowable credits and their allocation to affiliates shall be made on forms to be supplied by the ,Alabama Department of

Insurance, which forms shall be filed with the insurer's annual statement.

(ii) Economic development credits allowed to foreign insurers shall be treated as Alabama premium taxes paid by the insurers for purposes of calculating any retaliatory tax due under Section 27-3-29.

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

No. 98-2023

IN THE

Supreme Court of the United States

ALABAMA MUNICIPAL INSURANCE CORPORATION, *et al.*,

Petitioners,

v.

STATE OF ALABAMA; JAMES P. HAYES, JR., Commissioner of the Alabama Department of Revenue; and DAVID PARSONS, Acting Commissioner of the Alabama Department of Insurance,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

BILL PRYOR
Attorney General of Alabama
11 South Union Street
Montgomery, AL 36130
(334) 242-7401

MATTHEW H. LEMBKE
Counsel of Record
SCOTT B. SMITH
BRADLEY ARANT ROSE & WHITE LLP
2001 Park Place, Suite 1400
Birmingham, AL 35203-2736
(205) 521-8000

Attorneys for Respondents

154552

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Supreme Court of Alabama erred when it applied settled rational basis doctrine under the Equal Protection Clause to reject a fact-bound challenge to Alabama's insurance premium tax statute?

2. Whether the Supreme Court of Alabama applied a "beyond a reasonable doubt" standard to a challenge under the United States Constitution to Alabama's insurance premium tax statute, and whether, if it did, the court erred in doing so?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	6
I. This Case Involves The Fact-Bound Application Of Settled Rational Basis Doctrine Under The Equal Protection Clause, And There Is No Conflict Of Authority Among The Lower Federal Courts Or The State Courts Concerning This Standard.	6
A. The Supreme Court of Alabama closely adhered to this Court's precedents in making the fact-bound determination that the statute at issue does not violate the Equal Protection Clause.	7
B. Petitioners have concocted nonexistent conflicts with this Court's jurisprudence, Alabama public policy, and decisions of lower courts in a futile attempt to make this case appear to be worthy of certiorari review.	11

Contents

Page

1. The Act's incentives for future economic activities are based on alterable economic conditions, not matters frozen in the past. 12

2. The existence of separate Alabama statutes that seek to advance complementary goals does not give rise to a constitutional violation. .. 15

3. The Act does not employ classifications for their own sake. . 21

II. Petitioners' Contention Concerning The Supreme Court Of Alabama's Use Of A "Beyond A Reasonable Doubt" Standard Was Not Raised Below And Relies On A Mischaracterization Of The Alabama Court's Opinion. 23

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Alabama State Fed'n of Labor v. McAdory, 18 So. 2d 810 (Ala. 1944) 2

Allegheny Pittsburgh Coal Company v. County Comm'n of Webster County, W. Va., 488 U.S. 336 (1989) 16, 17, 20

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 9

Bagley v. Vermont Dept. of Taxes, 500 A.2d 223 (Vt. 1985) 15

Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232 (1890) 9

Birchfield v. Birchfield, 417 N.W.2d 891 (S.D. 1988) 25

Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. 1991) 24, 25

Bruns v. Iowa, 503 N.W.2d 607 (Iowa 1993) 24

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 10, 11, 18

Dandridge v. Williams, 397 U.S. 471 (1970) 8

Cited Authorities

	Page
Delta Air Lines v. August, 450 U.S. 346 (1981) ...	23
Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307 (1993) ..	8, 17, 22
Ford Motor Co. v. Barrett, 800 P.2d 367 (Wash. 1990)	25
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)	9, 16
Gilman v. Martin, 662 P.2d 120 (Alaska 1983) ...	15
Haden v. Watson, 117 So. 2d 694 (Ala. 1960)	2
Harbor Insurance Co. v. Groppo, 544 A.2d 1221 (Conn. 1988)	25
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)	11
Madden v. Kentucky, 309 U.S. 83 (1940)	9, 22
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)	1, 2, 18, 19
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)	8
Nordlinger v. Hahn, 505 U.S. 1 (1992)	9, 11, 16

Cited Authorities

Page

Pace Membership Warehouse v. Axelson, 938 P.2d 504 (Colo. 1997) 24

Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) 9, 11

Richardson v. Sport Shinko, 880 P.2d 169 (Haw. 1994) 24

Romer v. Evans, 517 U.S. 620 (1996) 21

Saenz v. Roe, __ U.S. __, 119 S. Ct. 1518 (1999) . 15

State v. American Bankers Ins. Co., 374 N.W.2d 609 (S.D. 1985) 18, 19

United States v. Carolene Products Co., 304 U.S. 144 (1938) 4, 8, 9

United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) 11, 14, 21, 22

Vance v. Bradley, 440 U.S. 93 (1979) 11

Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648 (1981) 3, 19

Westling v. County of Mille Lacs, 581 N.W.2d 815 (Minn. 1998), *cert. denied*, 119 S. Ct. 872 (1999) 24

Cited Authorities

	Page
Williams v. Vermont, 472 U.S. 14 (1985)	11
Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955)	11, 17
Wisconsin v. Akins, 544 N.W.2d 392 (Wis. 1996)	24
Youakim v. Miller, 425 U.S. 231 (1976)	23
Zobel v. Williams, 457 U.S. 55 (1982)	12, 14, 15
Statutes:	
7 U.S.C. § 1445	18
15 U.S.C. § 1341	18
Ala. Code § 27-4A-3	12
Ala. Code § 27-4A-3(a)	12
Ala. Code § 27-4A-3(a)(3)b	5
Ala. Code § 27-4A-3(a)(3)b.1	5
Ala. Code § 27-4A-3(a)(3)b.2	5
Ala. Code § 27-4A-3(a)(3)c	5
Ala. Code § 27-4A3(a)(3)d	5

Cited Authorities

	Page
Ala. Code § 27-4A-3(a)(3)d.1	6
Ala. Code § 27-4A-3(a)(3)d.2	6
Ala. Code § 27-41-3(a)(3)	4
Ala. Code § 27-41-34(b)(2)	17
Ala. Code § 27-41-34(g)	20
Ala. Code § 27-41-41	20
Rules:	
United States Supreme Court Rule 10(b)	7
United States Supreme Court Rule 10(c)	7
Other Authority:	
Robert B. Ekelund, Jr. and Robert D. Tollison, *Economics* 182 (2d ed. 1988)	13

Respondents, the State of Alabama, the Commissioner of the Alabama Department of Revenue, and the Commissioner of the Alabama Department of Insurance (collectively, the "State"), respectfully request this Court to deny the petition for a writ of certiorari. The petition seeks review of the Supreme Court of Alabama's decision upholding the constitutionality of Alabama's insurance premium tax law. The Supreme Court of Alabama's opinion is reported at 730 So. 2d 107 (Ala. 1998), and is reproduced as Appendix A to the petition. The decision of the Circuit Court of Montgomery County, Alabama is unreported, but is attached to the petition as Appendix B. The Insurance Premium Tax Reform Act of 1993 is included as Appendix C to the petition.

STATEMENT OF THE CASE

Petitioners' statement of the case fails to include a number of salient facts necessary to a full understanding of this case. The State incorporates by reference the facts and procedural history in the Supreme Court of Alabama's opinion, *see* Pet. App. at 2a–6a, in addition to making the following observations.

As an initial matter, the petition glosses over the history of Alabama's insurance premium tax law. In 1985, this Court determined that, under the Equal Protection Clause, Alabama could not justify its imposition of higher tax rates on out-of-state insurance companies than in-state companies on the basis of residence alone. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878–79 (1985). On remand, the out-of-state plaintiffs in *Metropolitan Life* agreed to dismiss their litigation in exchange for passage of new premium tax legislation to equalize the rates charged to in-state and out-of-state insurance companies. *See* R. 132–33; Pls. Ex. 45.

After many failed attempts to implement tax reform consistent with this Court's decision in *Metropolitan Life*, the Alabama Legislature enacted the Insurance Premium Tax Reform Act of 1993 (the "Act") to overhaul Alabama's insurance premium taxation system. *See* Pet. App. at 2a–3a; Pls. Ex. 3, R. 311–12. The Governor signed the Act on May 17, 1993. *See* Pls. Ex. 3, at p. 17. By its terms, the Act went into effect on January 1, 1995. *See id.* § 14. Petitioners filed suit to challenge the Act's constitutionality on March 9, 1995. R.1.

Three years later, the Supreme Court of Alabama unanimously upheld the constitutionality of the Act under both the Alabama and United States Constitutions. *See* Pet. App. at 1a. The court first examined the Act's constitutionality under the Alabama Constitution. Recognizing the deference owed to acts of the Legislature, the court invoked Alabama's constitutional rule that a state statute will not be invalidated "unless it is clear beyond reasonable doubt that [the act violates] the fundamental law." Pet. App. at 6a (*quoting Alabama State Fed'n of Labor v. McAdory*, 18 So. 2d 810, 815 (Ala. 1944)). The court then noted that taxation statutes receive the greatest amount of judicial deference:

> Legislative classifications in tax matters are presumably valid, the burden being on the challenger to prove that such a classification or subclassification does not rest on a reasonable basis and such statutes are not to be deemed unconstitutional or invalid if any state of facts can be conceived which would support the subject of the tax.

Pet. App. at 7a (quoting *Haden v. Watson*, 117 So. 2d 694, 696 (Ala. 1960)).

Applying these long-standing principles, the Alabama court concluded that petitioners had failed to meet "their heavy burden" of challenging tax legislation under the Alabama Constitution. Pet. App. at 10a. The court agreed with the State that the Act does not discriminate between classes of insurers, observing that the Act "imposes a flat premium tax rate on all insurers, foreign and domestic, without exception" and employs tax credits "based on objective, clearly ascertainable criteria." Pet. App. at 9a. The court rejected petitioners' economic argument outright. Recognizing that some of petitioners "are economically unable at this time to qualify for the credits," the court pointed out "that their inability to qualify is a result of their own business decisions and their own economic performance." *Id.* The court also understood how the changeable nature of the market could alter petitioners' conditions. Notwithstanding the fact that some of petitioners could not invest the maximum amount in Alabama real estate because "their total assets [were] too low" during the tax year at issue, the court realized "those companies could grow and thus be able to invest more" in future years. *Id.* Accordingly, the court held the Act did not violate the Alabama Constitution. Pet. App. at 10a.

The Supreme Court of Alabama then proceeded to decide the federal constitutional challenge. Citing *Western & Southern Life Insurance Company v. State Board of Equalization of California*, 451 U.S. 648, 657 (1981), the court asked, "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that the use of the challenged classification would promote that purpose?" Pet. App. at 10a. By the court's reasoning, the answer to both questions was yes. The court credited the State's argument that the Office

Credit would "encourage competition among insurers in rural areas of the state" by creating incentives for insurers "to open more offices in the state, . . . presumably in areas not already dominated by their competitors," thereby providing greater access to insurance for citizens of rural areas." Pet. App. at 11a. The court also accepted the State's argument that the Office Credit "is designed to encourage the employment of Alabama citizens" and that the Property Credit "is designed to encourage all insurance companies, foreign and domestic, to invest in Alabama property." *Id.*

Applying this Court's settled "rational basis" doctrine to these facts, the Supreme Court of Alabama concluded it was "at least debatable" whether "the challenged tax credits are rationally related to [the State's] goals." Pet. App. at 11a (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)). The Alabama court decided "[i]t was reasonable for the members of the legislature to believe" the Act's tax credits would "encourag[e] investment in the state and encourag[e] insurers to employ Alabama citizens and to open offices in rural areas." Pet. App. at 11a. Consequently, the court held "the challenged credits do not violate the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution." *Id.* at 11a–12a.

In addition to overlooking the Act's history and short-changing the Supreme Court of Alabama's analysis, petitioners' discussion also gives the erroneous impression that the Act offered little, if any, benefit to them. In fact, the record demonstrates that petitioners reaped meaningful benefits from the operation of the Act. The Act imposes a base tax rate of 3.6% on all property and casualty insurance premiums collected in any given tax year. Ala. Code § 27-41-3(a)(3). The Act provides tax relief from the base

rate in the form of reduced rates and tax credits to every property and casualty insurance company doing business in Alabama. *See id.* §§ 27-4A-3(a)(3)b, -3(a)(3)c, & -3(a)(3)d.

Every petitioner with taxable premiums in 1995 took advantage of these provisions in one way or another, something the petition conspicuously elides. For instance, the Act taxes all "property insurance and multi-peril insurance" written in high-risk, rural areas at only 1% per annum. *Id.* § 27-4A-3(a)(3)b.1. The same is true for homeowners' policies covering "mobile homes" and "low value dwelling policies in a face amount of $40,000 or less," which are also taxed at 1%. *Id.* § 27-4A-3(a)(3)b.2. Petitioners fail to mention the significant tax benefit they received under these provisions. The evidence at trial showed Petitioner Baldwin Mutual Insurance Company paid only 1% in tax on $7.1 million of its $8.3 million in premiums because the bulk of its business fell within the statutory exemption for high-risk fire protection and low-value homeowners' policies. *See* R. 124–25, 306–08; Pls. Ex. 65. As a result, Baldwin Mutual's effective premium tax rate on its Alabama property and casualty business in 1995 was lower than that of Alfa Mutual Insurance Company, the insurer portrayed by petitioners as the Act's largest beneficiary. *Compare* Pls. Ex. 65 *with* Pls. Ex. 48. *See* R. 125, 306. Petitioners Alabama Municipal Insurance Company and Southern Guaranty Insurance Company also took advantage of this 1% tax rate. *See* R. 300; Pls. Exs. 62, 69.

The Act also provides tax credits that reward the provision of insurance throughout the State, employment of Alabama workers, and investment in Alabama real estate. For example, the Office Credit provides a credit against the 3.6% base rate for "each office owned or leased by an insurer

in the State of Alabama and used for insurance operations" in increments according to the number of employees in the office. Ala. Code § 27-4A-3(a)(3)d.1. The Property Credit entitles an insurer to a 0.10% credit against the 3.6% base rate for "each $1,000,000 in value of real property investments in the State of Alabama." *Id.* § 27-4A-3(a)(3)d.2. Again, petitioners fail to mention the benefits they received from these provisions. In fact, the record shows five of the seven petitioners received tax credits in 1995 under the Office Credit, the Property Credit, or both. *See* Pls. Exs. 57–59. Presumably, the other two petitioners did not receive credits due to conscious business choices. Alabama Municipal's president testified that the company could not use the Office Credit because it has no offices or employees in Alabama, and it chose not to take advantage of the Property Credit because real estate is not a "proper investment for our firm." R. 300–01.

REASONS FOR DENYING THE WRIT

I. THIS CASE INVOLVES THE FACT-BOUND APPLICATION OF SETTLED RATIONAL BASIS DOCTRINE UNDER THE EQUAL PROTECTION CLAUSE, AND THERE IS NO CONFLICT OF AUTHORITY AMONG THE LOWER FEDERAL COURTS OR THE STATE COURTS CONCERNING THIS STANDARD.

This case is a run-of-the-mill state tax challenge that does not present a novel question of federal constitutional law. Notwithstanding petitioners' multi-faceted attempt to manufacture a cert-worthy question, this case involves nothing more than the Supreme Court of Alabama's application of settled rational basis principles under the Equal

Protection Clause to the particularized facts of this case. The Supreme Court of Alabama upheld the Act because it "employ[s] reasonable classifications designed to reach . . . legitimate legislatively determined goals." Pet. App. at 11a. Arising in an area in which this Court has given lower courts clear guidance, this case does not involve an "important federal question" on which the Supreme Court of Alabama has rendered a decision in conflict with a decision of another state court of last resort or one of the United States courts of appeals. Sup. Ct. R. 10(b). The Alabama court in this case did not decide an unsettled question of federal law, nor did its ruling in this case conflict with other relevant decisions of this Court. *See* Sup. Ct. R. 10(c). This Court should therefore decline to expend its limited resources by granting certiorari review in this case.

A. The Supreme Court of Alabama closely adhered to this Court's precedents in making the fact-bound determination that the statute at issue does not violate the Equal Protection Clause.

In determining the constitutionality of the Act, the Supreme Court of Alabama followed this Court's well-developed rational basis analysis under the Equal Protection Clause. Review of the Alabama court's decision would entail nothing more than a determination of whether this Court's settled precedents were correctly applied to the facts of this case. Notwithstanding petitioners' remarkable claim that this area of the law requires further "clarity and coherence," Pet. at 9, the core constitutional doctrine at issue has been settled for sixty years: "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis

within the knowledge and experience of the legislators." *Carolene Products*, 304 U.S. at 152. *Accord Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461–63 (1981). If a legislative classification has a "reasonable basis," it does not "offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

When it undertook its analysis of the Act under the Equal Protection Clause, the Supreme Court of Alabama faced a body of law clearly defining the high degree of deference owed to legislative enactments under rational basis scrutiny. In *Federal Communications Commission v. Beach Communications, Inc.*, this Court described the governing standard as "a paradigm of judicial restraint." 508 U.S. 307, 314 (1993). Without dissent, the Court declared, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification." *Id.* at 313 (emphasis added). In other words, a "legislative choice is not subject to courtroom fact-finding and may be based on *rational speculation unsupported by evidence or empirical data*." *Id.* at 315 (emphasis added). The necessity of legislative line-drawing thus "renders the precise coordinates of the resulting legislative judgment *virtually unreviewable*, since the legislature must be allowed to approach a problem incrementally." *Id.* at 316 (emphasis added).

Furthermore, when tax laws are at issue, the standard of review is even more deferential. As this Court has made plain,

the Fourteenth Amendment to the United States Constitution "was not intended to compel the states to adopt an iron rule of equal taxation." *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). "To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959). As a result, federal constitutional review of state taxation statutes provides legislatures "the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). This is especially true when considering narrow exemptions from a general scheme of taxation such as those at issue here, where the "latitude of discretion is notably wide." *Nordlinger v. Hahn*, 505 U.S. 1, 17 (1992). *Accord F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550–51 (1983). Consequently, this case involves arguably the most deferential standard of review in all of constitutional law.

The Supreme Court of Alabama followed this Court's rational basis precedents to the letter. First, the Alabama court determined that the Act employs reasonable classifications to accomplish the State's legitimate goals of encouraging investment in Alabama, increasing employment of Alabama citizens, and providing insurance to Alabama's most underserved areas. *See* Pet. App. at 11a. The court then decided that the question whether the challenged tax credits are rationally related to those goals is "at least debatable." *Id.* (*quoting Carolene Products*, 304 U.S. at 154). Furthermore, the Alabama court found it was reasonable for the Alabama Legislature to believe that the Act would further those goals. *Id.* Based upon those findings, the Supreme

Court of Alabama ultimately (and unanimously) concluded the Act does not violate the Equal Protection Clause of the United States Constitution. *See id.* at 11a–12a.[1]

Although cloaked in a contention that the Supreme Court of Alabama's analysis was not searching enough,[2] the essential thrust of petitioners' argument is that the judiciary should be empowered to re-tailor the legislative classifications to better support the interests asserted by the State. This Court has repeatedly rejected such a view of the judiciary's authority under rational basis scrutiny. In *City of New Orleans v. Dukes*, this Court refused to invalidate a New Orleans city ordinance that favored established businesses over new ones, stating that the Equal Protection Clause does not empower the judiciary to "sit as a superlegislature to

---

1. Notably, petitioners do not (and indeed cannot) challenge the legitimacy of the legislative purposes articulated by the State. Therefore, this case arises solely under the second prong of the rational basis test, *i.e.*, it turns upon whether the Alabama Legislature could have reasonably determined that the challenged credits would promote these purposes.

2. Petitioners' contention that the Supreme Court of Alabama did not undertake a sufficiently detailed analysis of the efficacy of the Act in furthering the proffered State interests cannot withstand scrutiny. It hardly requires a lengthy discussion to conclude that a credit for opening offices with certain numbers of employees promotes the State's interest in creating jobs and encouraging the opening of offices in rural areas. Petitioners' argument as to the insufficiency of the Alabama court's analysis in this regard is premised on their faulty view of how the Act operates. *See infra* at 12–14. In addition, petitioners' claim that the State failed to address the alleged inability of certain insurers to take full advantage of the credits overlooks the Alabama court's discussion of that very point. *See* Pet. App. at 9a.

judge the wisdom or desirability of legislative policy determinations . . . in the local economic sphere." 427 U.S. 297, 303 (1976). More recently, in *Nordlinger v. Hahn*, this Court refused to strike as unconstitutional exemptions to a state's general taxation law, reiterating how "[i]n structuring internal taxation schemes 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' " 505 U.S. at 11 (1992) (*quoting Williams v. Vermont*, 472 U.S. 14, 22 (1985), and *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). *Accord Taxation with Representation*, 461 U.S. at 547–48. This Court has indicated that the more appropriate place to correct what petitioners view as an unfair tax benefit to their competitors is at the polls, not in the courts. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 n.12 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488–89 (1955).

A grant of certiorari in this case would be a waste of this Court's limited resources. Rational basis doctrine under the Equal Protection Clause in cases involving state tax laws has been well defined by this Court. There is no need for additional guidance. The Supreme Court of Alabama correctly applied this Court's settled precedents to the facts of this case in reaching the decision below. No additional review is necessary.

B. Petitioners have concocted nonexistent conflicts with this Court's jurisprudence, Alabama public policy, and decisions of lower courts in a futile attempt to make this case appear to be worthy of certiorari review.

Through a strained and ultimately indefensible reading of several of this Court's precedents, petitioners cite three

ostensible categories of Equal Protection violations inherent in the Act, none of which merits certiorari review by this Court. In fact, petitioners' alleged conflicts with this Court's jurisprudence and the decisions of other courts melt away under the most casual scrutiny.

1. *The Act's incentives for future economic activities are based on alterable economic conditions, not matters frozen in the past.*

Petitioners' claim that the Supreme Court of Alabama's decision ran afoul of *Zobel v. Williams*, 457 U.S. 55 (1982) — because, the argument goes, the State's interest in encouraging future activity is tied to past conduct, *see* Pet. at 11–15 — is factually, economically, and legally inaccurate. As a factual matter, the credits available under the Act are not tied to past conduct. The Act was signed into law on May 17, 1993, Pet. at 4, but it did not take effect until the tax year beginning January 1, 1995. Ala. Code § 27-4A-3. Consequently, all insurers in Alabama had more than eighteen months to make the business decisions necessary to qualify for the Act's tax credits. Furthermore, the Act imposes premium taxes each year, taking into account each insurer's ability to qualify for the Office Credit and the Property Credit based on its circumstances and holdings for that tax year. *Id.* § 27-4A-3(a). Petitioners' contention that the Act "contains no requirement that there be economic activity as a condition to achieving either credit," Pet. at 11, therefore, cannot be reconciled with the practical operation of the credits. As the State proved at trial, maintaining offices throughout Alabama, employing Alabama citizens, and retaining or purchasing property in Alabama during any given tax year qualify as present economic activity encouraged by the credits. *See* R. 494–502.

Economically speaking, petitioners' argument that the tax credits reward past economic activity merely states the obvious. Tax credits, like taxation in general, are inherently based upon past activity because they are applied at the end of a given tax year. The more pertinent question is whether the tax credits provided by the Act create an incentive for future investment, employment, and provision of insurance to rural areas. To argue, as petitioners do, that the Act contains no incentive for future economic activity belies the realities of the market. Insurers, like every other company, make business decisions based on present conditions and future potential, not on past costs already sunk. *See* Robert B. Ekelund, Jr. and Robert D. Tollison, *Economics* 182 (2d ed. 1988). The Act, by incrementally rewarding insurers for the offices they maintain, workers they employ, and property they own throughout Alabama, encourages insurers to conduct economic activity in each taxation period. *See* R. 507. This is so even for a company that enjoyed the maximum credit allowable under the Act in a previous year; such a company must, under the Act, keep its offices open, continue employing its workers, and retain its property to enjoy the same tax benefit in the following year. By the same token, smaller companies who do not currently enjoy the maximum credits available under the Act have an incentive, in the words of the Supreme Court of Alabama, to "grow and thus be able to invest more." Pet. App. at 9a. Just because some of petitioners' competitors currently enjoy a greater fraction of the available tax credits does not mean the Act is irrational. "The task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment

be placed on different sides of the line, and the fact that the line may have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Fritz*, 449 U.S. at 179 (internal quotations and citation omitted).

Most important, as a matter of law this Court's holding in *Zobel* has no application to this case. Offices a company can close, employees it can fire, and property it can sell are not inalterable aspects of the past. What *Zobel* prohibits is purportedly encouraging future activity with statutes that reward conduct frozen in the past. *See Zobel*, 457 U.S. at 62. At issue in *Zobel* was an Alaska statute that allocated payments from a state fund to residents based upon the number of years of residency in the state since 1959. Although the statute was allegedly enacted to encourage persons to establish residency in Alaska, it rewarded persons based solely on "fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State." *Id.* at 59. There was no provision in the statute that capped the extra benefit that a resident received who had lived in Alaska for a longer period of time vis-à-vis a resident who had lived in Alaska for a shorter period of time, so there was no means by which the latter resident could equalize the payment he received from the state fund. Unlike the situation in *Zobel*, the Act requires that a new assessment of entitlement to the credits be made each year, so any insurer that undertakes sufficient economic activity can attain the maximum benefit allowed by the Act.[3]

---

3. Even if *Zobel* were otherwise relevant, the continuing applicability of the case as an Equal Protection Clause precedent has (Cont'd)

The decisions of the Vermont Supreme Court and the Alaska Supreme Court cited by petitioners are equally inapposite. In each of those cases, as in *Zobel*, similarly situated individuals were accorded different benefits based on the inalterable criterion of past residency. *See Bagley v. Vermont Dept. of Taxes*, 500 A.2d 223, 224–26 (Vt. 1985); *Gilman v. Martin*, 662 P.2d 120, 125–27 (Alaska 1983). Under the Alabama Act, by contrast, similarly situated insurers in a given year are afforded the same credits, irrespective of place or duration of residency. Thus, there is no basis for petitioners to contend that there is a conflict of authority among these state courts which would support exercise of this Court's certiorari jurisdiction.

2. *The existence of separate Alabama statutes that seek to advance complementary goals does not give rise to a constitutional violation.*

In a further effort to justify their argument for certiorari review, petitioners make the astounding suggestion that a

---

(Cont'd)
been called into serious question by the Court's recent decision in *Saenz v. Roe*, __ U.S. __, 119 S. Ct. 1518 (1999). The ruling in *Zobel* seemed to be grounded in the aspect of the right to travel related to the right of new residents of a State to be free from being disadvantaged by their status as new residents. *See Zobel*, 457 U.S. at 60 n.6; *id.* at 66 (Brennan, J., concurring); *id.* at 71 (O'Connor, J., concurring in judgment). In *Saenz*, this Court determined that the right to travel is not an Equal Protection Clause concern, but rather is founded on the Privileges and Immunities Clause. *Saenz*, 119 S. Ct. at 1526–27. Furthermore, to the extent that *Zobel* is based on the right to travel, it has no relevance to this case because there has been no allegation that the Act makes any distinction between in-state and out-of-state insurers or between insurers with an established presence in Alabama and those who have recently entered the State's insurance market.

state commits a constitutional violation whenever it enacts a statute that embodies a policy inconsistent with that contained in a separate, independent statute. *See* Pet. at 15–22. Not only is this suggestion wholly unsupported by this Court's precedents, but petitioners' argument is also premised on a faulty analysis of the interaction between the Act and another Alabama statute.

The case on which petitioners rely to support their novel argument in this regard is *Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia*, 488 U.S. 336 (1989); but *Allegheny Pittsburgh* does not even remotely support the sweeping proposition of constitutional law that petitioners ascribe to it. In that case, the Court held a county tax assessor committed an Equal Protection Clause violation when she assessed property taxes in direct violation of a state constitutional provision requiring tax assessment proportional to the value of the property. Far from endorsing *Allegheny Pittsburgh* as a broad prohibition against potentially inconsistent statutes, this Court has subsequently explained that *Allegheny Pittsburgh* was "the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of a [proportional] tax scheme." *Nordlinger*, 505 U.S. at 15. Indeed, the Court has reaffirmed that, "[f]or purposes of rational-basis review, 'the latitude of discretion is notably wide in . . . the granting of partial or total exemptions [from a general scheme of taxation] upon grounds of policy.' " *Id.* at 17 (*quoting F.S. Royster Guano Co.*, 253 U.S. at 415).

In this case, petitioners do not contend that the State of Alabama applied the credits allowed under the Act in a manner inconsistent with the terms of the Act. Instead,

petitioners claim that the incentive to invest in Alabama real property created by the Property Credit is inconsistent with the 10% property-to-asset limit for insurers set by Alabama Code § 27-41-34(b)(2). *See* Pet. at 15–22. What petitioners portray as an inconsistency is, in reality, sound legislative policy accomplished by two complementary statutes. On one hand, the Property Credit encourages insurers to buy Alabama real estate to foster investment in Alabama, a point petitioners' own experts conceded at trial. *See* R. 110, 279. On the other hand, as one of petitioners' experts testified, the 10% property-to-asset limit assures the solvency of insurers within the guidelines established by the National Association of Insurance Commissioners. *See* R. 42.

It is entirely reasonable for the State of Alabama to foster investment in real estate via the Property Credit while at the same time protecting against insolvency by limiting the percentage of assets an insurer may invest. For, as this Court has repeatedly recognized, "[t]he problem of legislative classification is a perennial one, admitting of no doctrinaire definition"; legislatures are therefore free to treat "[e]vils in the same field" with "different remedies," so long as those remedies are not invidious. *Beach Communications*, 508 U.S. at 316 (quoting *Williamson*, 348 U.S. at 489). The State's complementary goals of encouraging investment and ensuring solvency are equally legitimate. Neither *Allegheny Pittsburgh* nor the Equal Protection Clause prevents the State from pursuing these goals simultaneously through different means.

For this Court to intrude upon state legislative determinations in the manner proposed by petitioners would mark a sea change in rational basis Equal Protection Clause jurisprudence, and would impose a nearly impossible burden

on courts reviewing state statutes. Courts would have to canvass the entire universe of a state's statutes to ascertain whether any of them reflects a policy inconsistent with the statute in question. Such an approach would ignore the realities of the legislative process in which competing and sometimes conflicting objectives are often at play in different pieces of legislation.[4] Petitioners' approach would also conflict with this Court's admonition that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Dukes*, 427 U.S. at 303. The Alabama Legislature passed the Act to eliminate the residency-based discrimination struck down by this Court in *Metropolitan Life* and enacted the tax credits to encourage investment, employment, and the provision of insurance in rural areas. The Supreme Court of Alabama, while recognizing that certain insurers were presently unable to reap the full benefits of the Act, did not deem the State's policies irreconcilable. *See* Pet. App. at 9a. Because this Court does not sit as a superlegislature, it simply has no basis to upset the policy determinations made by the Alabama Legislature and reviewed by the Supreme Court of Alabama.

Petitioners' suggestion that the decision below conflicts with a decision of the South Dakota Supreme Court is baseless. There is no difference in the South Dakota court's reasoning in *State v. American Bankers Insurance Company*, 374 N.W.2d 609 (S.D. 1985), and that employed by the

---

4. One obvious example is the federal government's treatment of tobacco. While one federal law provides price supports to tobacco farmers, *see* 7 U.S.C. § 1445, another provides federal funding for anti-tobacco campaigns, *see* 15 U.S.C. § 1341.

Supreme Court of Alabama in this case. In fact, the South Dakota court cites the same precedent of this Court — *Western & Southern Life Insurance Company v. State Board of Equalization* — that the Alabama court cited as the touchstone for its constitutional analysis. *Compare American Bankers*, 374 N.W.2d at 615, *with* Pet. App. at 10a. Moreover, the insurance premium statute at issue in *American Bankers* taxed unlicensed out-of-state companies at a rate one and a half times the rate payable by domestic insurers or licensed foreign insurers. *See* 374 N.W.2d at 615. Relying on this Court's holding in *Metropolitan Life*, the South Dakota court held the statute unconstitutional on the ground that "the imposition of a discriminatory tax on foreign corporations on the pretext of promoting domestic industry within the state is prohibited by the equal protection clause." *Id.* at 616–17. Petitioners cannot argue that this proposition has any bearing upon this Act, which the Alabama Legislature passed to remove any distinctions based upon residency in direct response to this Court's decision in *Metropolitan Life*.

Even if this Court were inclined to consider the question whether two state statutes embodying potentially inconsistent policies can give rise to an Equal Protection violation under rational basis scrutiny, this case is a poor vehicle for such consideration because the Act does not operate in the stark terms portrayed by petitioners. The petition contends, "Alabama law actually *precludes* most of the State's insurance companies from taking full (and in many cases, *any*) advantage of the credit," Pet. at 16, going so far at one point to allege "that many insurance companies are forbidden by Alabama law from making the type of investment that would enable them to qualify for the [Property Credit]," *id.* at 19. What petitioners do not say, however, is that their

inability to take full advantage of the tax credits is attributable more to their individual economic circumstances than to Alabama law. In any event, petitioners have oversimplified the requirements of Alabama's Insurance Code.

Alabama's statutory limits on real estate investment are much more nuanced than the petition might suggest. The 10% property-to-asset limit does not apply "where the total amount invested by an insurer in such investments does not exceed the total capital and surplus of such insurer, less the minimum capital and surplus required [for admitted assets]." Ala. Code § 27-41-34(g). In other words, any insurer "may make an investment without limitation as to kind" — for example, more than 10% of its assets in real property — provided its "admitted assets" shown on its financial statements are "eligible investments," as defined by §§ 27-41-7 to 27-41-35. *Id.* § 27-41-41. Petitioners' expert recognized this at trial, testifying that 10% of an insurer's assets is "the maximum that they could invest *and still have it be an admitted asset*." R. 43 (emphasis added). Rather than create an absolute bar preventing an insurer from owning real estate whose value exceeds 10% of the insurer's assets, the Alabama Insurance Code allows an insurer to purchase an unlimited amount of real estate to qualify for the Property Credit, provided the insurer does not need the additional real estate as an asset for purposes of demonstrating its financial soundness to the insurance commissioner. Even if *Allegheny Pittsburgh* precluded a state from furthering competing policies with different statutes (which it does not), this case does not squarely present that situation.

3. *The Act does not employ classifications for their own sake.*

Petitioners' argument, based on *Romer v. Evans*, 517 U.S. 620 (1996), and a number of separate or dissenting opinions in other cases, that the Act employs classifications for their own sake is easily dismissed. As a threshold matter, this case bears no relation to *Romer*, where the citizens of Colorado passed a statewide referendum excluding gays, lesbians, and bisexuals from state protection. Although petitioners obviously feel the Act is unfair (going so far as to compare its tax credits to "gerrymandering," *see* Pet. at 23), the Act is a far cry from laws that "singl[e] out a certain class of citizens for disfavored status" or "deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 633, 635.

Furthermore, petitioners' theory that one company convinced the Alabama Legislature to grant it favored status requires a highly speculative view of the record. For every record citation that petitioners claim confirms their theory, the State can point to more rational explanations for the tax credits, such as encouraging insurance companies to invest in real property, fostering competition in the industry, and creating incentives for insurers to open offices, employ workers, and provide insurance in rural areas. *See* R. 323–26, 407–09, 461–70, 472–75, 479; Pls. Ex. 2.

More fundamentally, the effort by petitioners to attack the Act on Equal Protection Clause grounds by presenting evidence at trial of the alleged political maneuvering behind the Act's passage is wholly inconsistent with this Court's precedents. Under rational basis Equal Protection Clause scrutiny, "this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *Fritz*, 449 U.S.

at 179. Indeed, "the absence of legislative facts explaining [the statute] on the record has no significance in rational-basis analysis," meaning "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315 (citations and internal quotations omitted). Furthermore, this Court has made clear that "legislative choice is not subject to courtroom fact-finding." *Id.* Petitioners essentially ask this Court to reverse course by adopting a jurisprudence where courts would conduct trials to determine which interest group was responsible for passage of legislation. Not only does such an approach ignore the impossibility of determining what influenced various legislators in voting for passage of a bill, but that approach would also lead to grave intrusions on core separation-of-powers and federalism concerns.

Where, as here, this Court has faced complaints raised by parties who "lost a political battle in which [they] had a strong interest," the Court has wisely chosen to defer to the political process. *See Fritz*, 449 U.S. at 179. As this Court stated over a half century ago, "the passage of time has only served to underscore the wisdom of . . . recogni[zing] the . . . large area of discretion which is needed by a legislature in formulating sound tax policies." *Madden*, 309 U.S. at 88. Petitioners hope to overthrow such wisdom by going behind the intentions of the Legislature to question the influence of certain interest groups. This argument, like all the others in the petition, does not withstand scrutiny.

II. PETITIONERS' CONTENTION CONCERNING THE SUPREME COURT OF ALABAMA'S USE OF A "BEYOND A REASONABLE DOUBT" STANDARD WAS NOT RAISED BELOW AND RELIES ON A MISCHARACTERIZATION OF THE ALABAMA COURT'S OPINION.

The second question presented by the petition does not warrant certiorari review because petitioners failed to raise it below. In all of their briefs below, including their brief in support of rehearing before the Supreme Court of Alabama, the petitioners never argued that the long-standing "beyond a reasonable doubt" standard governing tax challenges under the Alabama Constitution conflicts with federal law. Rather, petitioners first articulated this argument in their petition to this Court for certiorari review. *See* Pet. at 9, 24–26. Ordinarily, "this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Therefore, this question is not properly before the Court. *See Delta Air Lines v. August*, 450 U.S. 346, 362 (1981).

Even if the failure to raise the question below did not bar certiorari review by this Court, petitioners' second question rests on a gross mischaracterization of the Supreme Court of Alabama's opinion. Focusing on one sentence from an introductory portion of the opinion, petitioners (through the strategic use of ellipses) claim the Supreme Court of Alabama required them to prove "*beyond a reasonable doubt* that the tax credits at issue violate * * * the Federal Constitution." *See* Pet. at 7, 24.[5] A full and fair reading of

---

5. In full, the Alabama court wrote, "we conclude that it is not beyond a reasonable doubt that the tax credits at issue violate either the Alabama Constitution or the Federal Constitution." Pet. App. at 8a–9a.

the Alabama court's opinion, however, exposes the fallacy in petitioners' characterization of this issue. Following the quoted introduction, the court consciously applied its long-standing "beyond a reasonable doubt" standard governing tax challenges under the Alabama Constitution before it proceeded to the federal constitutional question. *See* Pet. App. at 9a–10a. The Supreme Court of Alabama took great pains to analyze the state and federal claims independently; it did not invoke the "beyond a reasonable doubt" standard in its analysis of the federal claim. Instead, the Alabama court used the approach outlined in this Court's precedents in reaching the conclusion that the Act contained no Equal Protection Clause violation. *See* Pet. App. at 10a–12a.

In a last-ditch effort to create a split of authority, petitioners pit a number of state supreme court decisions that purportedly hold "federal rational basis claims must be proved beyond a reasonable doubt" against federal courts of appeals that allegedly reject such a standard. *See* Pet. at 24–25. This alleged split of authority does not present a question warranting certiorari review in this case because the Alabama court did not apply the standard in question to the federal constitutional issue below. Even if that were not a bar to review, however, the alleged conflict of decisions is illusory. The state cases petitioners cite use the phrase "beyond a reasonable doubt" as a shorthand for a challenger's heavy burden of proving an Equal Protection Clause violation. *See Westling v. County of Mille Lacs*, 581 N.W.2d 815, 819 (Minn. 1998), *cert. denied*, 119 S. Ct. 872 (1999); *Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 506 (Colo. 1997); *Wisconsin v. Akins*, 544 N.W.2d 392, 395 (Wis. 1996); *Richardson v. Sport Shinko*, 880 P.2d 169, 191 (Haw. 1994); *Bruns v. Iowa*, 503 N.W.2d 607, 610 (Iowa 1993); *Blaske v.*

Smith & Entzeroth, Inc., 821 S.W.2d 822, 828–29 (Mo. 1991) (en banc); *Ford Motor Co. v. Barrett*, 800 P.2d 367, 374 (Wash. 1990) (en banc); *Harbor Insurance Co. v. Groppo*, 544 A.2d 1221, 1224 (Conn. 1988); *Birchfield v. Birchfield*, 417 N.W.2d 891, 894 (S.D. 1988). The only distinction between these state cases and the federal decisions cited by petitioners is the use of the phrase "beyond a reasonable doubt." That is a distinction without a substantive difference. This Court should not grant certiorari review to consider such a question of semantics.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

MATTHEW H. LEMBKE
Counsel of Record
SCOTT B. SMITH
BRADLEY ARANT ROSE & WHITE LLP
2001 Park Place, Suite 1400
Birmingham, AL 35203-2736
(205) 521-8000

BILL PRYOR
Attorney General of Alabama
11 South Union Street
Montgomery, AL 36130
(334) 242-7401

Attorneys for Respondents

Supreme Court, U.S.
FILED
SEP 2 1999
OFFICE OF THE CLERK

(3)

No. 98-2023

In the Supreme Court of the United States

ALABAMA MUNICIPAL INSURANCE CORPORATION, ET AL.,

Petitioners,

v.

STATE OF ALABAMA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONERS

RICHARD A. BALL, JR.
FRED B. MATTHEWS
Ball, Ball, Matthews & Novak, P.A.
Post Office Box 2148
Montgomery, AL 36102
(334) 387-7680

KENNETH S. GELLER
Counsel of Record
CHARLES ROTHFELD
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

10 pp

TABLE OF AUTHORITIES

Cases: **Page(s)**

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 6

Nordlinger v. Hahn, 505 U.S. 1 (1992).....4,5

Romer v. Evans, 517 U.S. 620 (1996).....2,4,5

South Dakota v. American Bankers Insurance Co., 374 N.W.2d 609 (1985).....4,5

Zobel v. Williams, 457 U.S. 55 (1982).....3,4

REPLY BRIEF FOR THE PETITIONERS

The State's response to the petition for certiorari helps to focus the important issues presented by this case. *First*, the State cannot deny that the system of tax credits challenged here was designed to benefit a single company (Alfa Mutual Insurance Company) and to disadvantage that company's competitors.[1] *Second*, despite some hemming and hawing, the State cannot deny that the credits, while providing significant benefits to that single company, are of no substantial value to most of the more than 600 other insurance companies doing property and casualty business in Alabama. See Pet. 4.[2] And *third*, it

---

[1] The State's only response to this point is the halfhearted complaint that "petitioners' theory that one company convinced the Alabama Legislature to grant it favored status requires a highly speculative view of the record." Br. in Opp. 21. But there is nothing speculative about the undisputed facts that the challenged credits were drawn in light of the number of offices and employees that Alfa had in Alabama; that the Real Property Investment Credit was modified at Alfa's request in a manner that restricted the number of companies that may take the full credit but had *no* effect on Alfa's ability to take the credit; and that Alfa is now the *only* company in the State that is able to take full advantage of both credits. See Pet. 4-5. The State takes issue with none of this.

[2] The State tries to obscure this reality, contending at various points that certain of the petitioners benefit from tax credits *other* than the ones at issue here (Br. in Opp. 5) and that "petitioners fail to mention the benefits they received from the[] [challenged] provisions." *Id.* at 6. Actually, the petition *does* mention the benefits that petitioners receive from the challenged credits (perhaps the State overlooked the reference because the amounts of the benefits are so small). See Pet. 4 n.4. For its part, the State fails to mention the trial court's factual finding that *none* of the petitioners "realized a substantial benefit from the credits" (Pet. App. 18a); that conclusion was not disturbed by the Alabama

(continued...)

accordingly is clear that Alabama has enacted a perverse regime that generally gives bigger tax credits to large than to small businesses and that, in particular, gives a substantial tax benefit to a single large company while disadvantaging that company's smaller competitors.

Against this background, the State's principal argument against certiorari is that the deferential nature of rational-basis equal protection review has long been settled and that all there is to do in this case is apply established principles to Alabama's peculiar statute. Br. in Opp. 6-11. But that is no answer at all to the questions posed in the petition. By the State's reasoning, review by this Court *never* is appropriate in equal protection cases. As we note in the petition (at 9-10 & n.7), however, the Court has reviewed — and reversed — lower court decisions rejecting rational-basis equal protection challenges with some frequency. It should do so again in this case: the Alabama Supreme Court's decision, while reciting the asserted rationales for the State's statute, makes no meaningful inquiry into whether the challenged credits possibly could advance the ostensible statutory purposes. This approach wholly eliminates "[t]he search for the link between classification and objective [that] gives substance to the Equal Protection Clause." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). Further review therefore is in order.

---

[2] (...continued)
Supreme Court. The State also asserts that the Alabama scheme is "more nuanced" than we suggest, hypothesizing circumstances in which the "10% property-to-asset limit does not apply." Br. in Opp. 20. Again, however, this assertion (which was not the basis for the ruling below) is belied by the trial court's undisturbed finding that "[a] company with less than one hundred million dollars in assets is effectively prohibited from investing as much as ten million dollars in real estate by § 27-41-34 *Code of Alabama*, 1975." Pet. App. 18a.

1. Although They Purport To Encourage Future Behavior, The Credits In Fact Reward Past Conduct

In addressing the specific arguments against the constitutionality of the credits advanced in the petition, the State begins by contending that the decision in *Zobel* v. *Williams*, 457 U.S. 55 (1982), is inapposite here because the credits' "incentives for future economic activities are based on alterable economic conditions, not matters frozen in the past." Br. in Opp. 12. But this assertion simply blinks reality. It is essentially undisputed that the credits were structured to benefit a particular company in light of that company's investment and employment structure *at the time of the credits' enactment*. In this light, the State's asserted rationale for the Office Facilities Credit — that it will "encourage competition among insurers in rural areas of the state" by "encourag[ing]" "insurers * * * to open more offices in the state, some of which presumably will be in areas not already dominated by their competitors, i.e., in rural areas" (Pet. App. 11a) — is simply nonsensical as applied to a company that *already* has enough facilities to qualify for the maximum credit.[3]

At the same time, the State's argument (at Br. in Opp. 13) that the credits may be justified on the ground that they encourage economic activity because they "incrementally reward[] insurers" for *continuing* the employment of workers and the operation of offices is unpersuasive. The credits make it impossible for new entrants — who really might provide more competition and employment — ever to compete on even terms with Alfa, meaning that the State's regime makes those new entrants "more likely to become dissatisfied and to *leave* the State." *Zobel*, 457 U.S. at 62 n.9 (emphasis added). As we note in the petition (at 13), "it would thus seem that the State would give a larger, rather than a smaller, [credit] to new [insurers] if

---

[3] In addition, the statute contains no requirement that any office be located in a rural area.

it wanted to" encourage employment and competition. *Zobel*, 457 U.S. at 62 n.9. The State has no response to this point.

2. *The State's Justification For The Real Property Investment Credit Is Pretextual*

We also explain in the petition that the State's rationale for the Real Property Investment Credit is pretextual because the State claims that the credit is designed to encourage an activity (investment in real estate) that other aspects of state law either limit or wholly *preclude* so far as most insurance companies are concerned. Pet. 15-22. The State's response to this point is directed at a caricature of our position. We do not contend, as the State would have it, that a "state commits a constitutional violation whenever it enacts a statute that embodies a policy inconsistent with that contained in a separate, independent statute." Br. in Opp. 16. Instead, our argument is the common-sensical one that, because state law limits or bars most insurance companies from investing in real estate, it is "impossible to credit" the State's assertion that the credit is intended to encourage investment by insurance companies in *that very same real estate* (*Romer*, 517 U.S. at 635); the case presents a situation "where the facts preclude[] any plausible inference that the reason for the unequal [treatment]" is the one asserted by the State. *Nordlinger* v. *Hahn*, 505 U.S. 1, 15 (1992). Instead, it seems plain that the credits were designed to be what they manifestly are: a discriminatory regime that benefits a particular company while disadvantaging its competitors.

That was precisely the analysis used in *South Dakota* v. *American Bankers Ins. Co.*, 374 N.W.2d 609 (S.D. 1985), which held that inconsistency between the stated goal of a tax statute that discriminated against certain out-of-state insurers and other elements of South Dakota law belied South Dakota's defense of its tax regime. The State here argues that *American Bankers* is inapposite because that case was decided on the ground that a tax intended to burden out-of-state corporations does not serve a legitimate purpose, a holding that has no bearing here. Br. in

Opp. 19. But the State disregards the relevant portion of the *American Bankers* analysis. Responding to South Dakota's argument that a discriminatory tax on foreign insurers that were not licensed to do business in the State could be justified on the ground that the levy encouraged foreign insurers to get a license, the South Dakota Supreme Court explained that other provisions of state law *exempted* the foreign insurers from the requirement that they obtain a license. 374 N.W.2d at 617. The court accordingly struck down the discriminatory tax because:

> the very class of foreign insurers which the legislature has exempted from the state's regulatory requirement is the same class of foreign insurers singled out for a higher tax burden because they have not obtained a certificate of authority. The discriminatory premium tax penalizes the very conduct seemingly promoted under [the exemption]. It is apparent, therefore, that the stated purposes for the imposition of a higher tax on unlicensed foreign insurers are pretextual.

Ibid. The trial court in this case used the same analysis, noting that the inconsistency between Alabama's solvency requirements and the Real Estate Investment Credit meant that the asserted rationale for the credit "could be considered pretextual." Pet. App. 21a. The Alabama Supreme Court's rejection of that approach cannot be reconciled with *American Bankers*.

3. The Challenged Credits Draw A Distinction For Its "Own Sake"

In addition, we argue in the petition that the discriminatory tax credits impermissibly draw a distinction for its "own sake." *Romer*, 517 U.S. at 635. See Pet. 22-24. The State's response to this point is, again, directed at a straw man. We do not contend that courts are obligated to conduct trials "to determine which interest group was responsible for passage of legislation." Br. in Opp. 22. But where the State's asserted justification for its classification is pretextual — and where State power is used

for the naked purpose of benefitting one entity and disadvantaging others who are identically situated — "the disparate treatment accorded the affected classes is arbitrary." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 441 (1982) (opinion of Blackmun, J.). That is the situation here.

4. Review Is Warranted Because The Alabama Supreme Court Erroneously Applied The "Beyond A Reasonable Doubt" Standard

Finally, we argue in the petition (at 24-27) that the Alabama Supreme Court committed a fundamental error by applying the "beyond a reasonable doubt" standard to the equal protection challenge in this case, and that other state courts of last resort have used a similar erroneous analysis. In response, the State makes no attempt to defend the applicability of such a standard in equal protection cases, and it does not deny that use of the standard would raise serious constitutional questions warranting this Court's attention. Instead, the State simply asserts that the Alabama Supreme Court (and the other courts cited in the petition) did not mean what they plainly said when they described "beyond a reasonable doubt" as the controlling standard. In the State's view, the Alabama court applied the "beyond a reasonable doubt" test in resolving the *state* constitutional challenge, but not in its analysis of the *federal* Equal Protection Clause claim. Br. in Opp. 23-24. In fact, however, the court below expressly applied that test to both claims, upholding the challenged credits because "it is not clear beyond a reasonable doubt that the tax credits at issue violate *either* the Alabama Constitution *or the Federal Constitution*." Pet. App. 8a-9a (emphasis added). Given the virtually insuperable burden placed on equal protection plaintiffs by the Alabama court, there is no reason to doubt that it applied that standard.[4]

---

[4] Curiously, the State *acknowledges* that the Alabama Supreme Court "consciously applied its long-standing 'beyond a reasonable

(continued...)

Perhaps recognizing the weakness of its contention on the merits, the State also asserts that review on this issue is not warranted because petitioners did not raise the point below. Br. in Opp. 23. But this contention is sophistic: petitioners did not object below to application of the "beyond a reasonable doubt" standard because they had neither the reason nor an opportunity to do so. The State did not contend in its arguments to the courts below that such a standard applied, and the trial court did not in fact apply it. The issue arose for the first time when the Alabama Supreme Court issued its decision actually applying the "beyond a reasonable doubt" standard. Petitioners therefore raised the issue at their earliest opportunity.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

---

[4] (...continued)
doubt' standard governing tax challenges under the Alabama Constitution." Br. in Opp. 24. The State nevertheless insists that the court conducted its federal and state constitutional inquiries separately, confining its "beyond a reasonable doubt" analysis to its consideration of the *state* constitution. See *ibid.* But this creative distinction does not hold up to scrutiny. The court's only invocation of the "beyond a reasonable doubt" standard expressly applied it to both the federal and the state constitutional challenges. The court's subsequent, separate discussion of the state-law challenge did not again advert to the standard of proof (see Pet. App. 9a-10a); indeed, the analysis that the court used to address both the federal and the state claims was quite similar. Compare *ibid.* with *id.* at 10a-12a. And that is no surprise, since the State argued to the Alabama Supreme Court that, "in equal protection challenges to tax statutes, the analysis under the state constitution is co-extensive with the analysis under the federal equal protection clause." Appellants' Br. 21 n.11. Because the State concedes that the "beyond a reasonable doubt" standard was used to decide the state constitutional challenge, it accordingly is apparent that the same standard was applied in the resolution of the federal claim.

Respectfully submitted.

RICHARD A. BALL, JR.
FRED B. MATTHEWS
Ball, Ball, Matthews & Novak, P.A.
Post Office Box 2148
Montgomery, AL 36102
(334) 387-7680

KENNETH S. GELLER
Counsel of Record
CHARLES A. ROTHFELD
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

SEPTEMBER 1999